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# THE LAWRENCE S. FLETCHER MEMORIAL FUND

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# INQUIRIES

INTO

# THE CONTRACT OF SALE

OF

# GOODS AND MERCHANDISE.

AS RECOGNISED IN

## THE JUDICIAL DECISIONS AND MERCANTILE PRACTICE OF MODERN NATIONS.

BY THE LATE

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PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

No. 5 MINOR STREET.

1845.

THIS Work was composed by PROFESSOR BELL a short time before his death, and was in part printed when he died. He had for some time been engaged in the preparation of a series of similar Treatises on other subjects relative to Commercial Law. But this is the only one which he had finally revised for publication.

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# INTRODUCTION.

THE regular forms and rigid maxims of Municipal Law are not always well suited to the occasions of mercantile intercourse. The familiar, easy, and confidential modes of doing business in fairs and markets, and amidst the hurry and bustle of commercial cities, will not abide the deliberate ceremonies necessary in ordinary life. In the effect too, of what is agreed on by the parties, merchants are often embarrassed by subtleties and fictions, invented by lawyers, to avoid difficulties in applying the ancient maxims and forms of the Common Law, to the altered manners and habits of intercourse of a commercial age.

There thus arise among merchants, rules and usages which gradually form a system of Mercantile Jurisprudence differing in many respects from the Municipal Law. To gain universal assent, those rules and usages must accord with the great principles of honesty, and the faith of contracts. While the system, thus grounded on the universal principles of justice, is fitted for the adoption of the various nations of the trading world, the rapid settlement of transactions, and the quick succession of engagements, seem practically to afford a safeguard against frauds, which might otherwise arise from relaxed forms.

Under this system, new rules of evidence in the authentication of written instruments, take the place of the solemnities, the attesting, sealing, and delivery of deeds at common law; new instruments of debt and credit are introduced in the form of Bills and Notes, affording a rapid and safe mode of transmitting money from country to country, and a convenient circulating medium among merchants. The laws of Mandate and Society undergo an important change, and, as applied to Agency and Partnership, admit of new relations with third parties formerly unknown. The law of Insurance gradually arises, by which misfortunes, from the dangers of the sea or enemy, are mitigated; and losses, which would otherwise crush a single merchant, are spread among many adventurers, to whom they even become a source of gain, while the merchant immediately concerned is rendered safe.

This system of jurisprudence has been called the LAW-MERCHANT; and forms a part of the code of every commercial country: of England, Scotland, France, Holland, and America. If the mercantile law, having thus the character of public jurisprudence, were a matter of convention among commercial nations, like the international rules recognised in Treaties, and were administered in courts of universal jurisdiction, such as those for the decision of questions of prize, greater uniformity might have prevailed than is found in the decisions of courts, and the usages of merchants in different countries. But as the greater number of cases arising between merchants occur in the course of daily traffic in the country where they are to be tried,

the municipal courts are the natural tribunals for their determination. And it is only where the administration in such courts is intrusted to judges of eminence, who are versed in the principles of jurisprudence, and accustomed to extend their views beyond the narrow limits of the municipal law, that the uniformity so much to be desired in commercial cases is studied and preserved.

In some countries, courts are established for the determination of mercantile questions. In others,—and in these mercantile law has been the best matured,—the administration is with the supreme judges,—the most eminent masters of jurisprudence.

In England, the system of Mercantile Law has been gradually improved, and brought to its present state of perfection, under a succession of very eminent judges. From Lord COKE's days to the time of Lord MANSFIELD, many great men are to be found, such as HARDWICK, RAYMOND, STRANGE, RYDER, by whom, in Courts of Equity and of Law, principles of general jurisprudence were applied in liberalizing and adapting to the decision of mercantile cases the severe maxims of the common law. But it was from Lord MANSFIELD's time, chiefly, that the most rapid improvement has been accomplished.

In that brilliant career which has raised to him the name of the Father of the Mercantile Law of England, Lord MANSFIELD uniformly characterized the LAW MERCHANT as a branch of public jurisprudence, not resting for its character and authority on the private institutions or local customs of any particular country, but on the principles and usages of trade, which common convenience, and a universal sense of justice, had recognised as fit to regulate the dealings of merchants and mariners in all the commercial countries of the world.

The decision of mercantile cases in England, proceeds, in the first instance, in the Courts of Nisi Prius, where Juries of Merchants, acting under the direction of the Judges of Westminster Hall, contribute their knowledge of usage and convenience to the formation of a judgment consistent at once with commercial experience and the principles of jurisprudence. In those held in London, the Chief-Justices of England preside; and the eminent judicial talents of such men as Lords MANSFIELD, KENYON, ELLENBOROUGH, TENTERDEN, and DENMAN in King's Bench; ROSLYN, EYRE, ELDON, GIBBS, and TINDAL in Common Pleas, have given to the Mercantile Law a degree of authority and weight which is acknowleded throughout the trading world. In the other mercantile cities of England, the verdicts of juries, under the direction of such Judges as BULLER, BAYLEY, LAWRENCE, GROSE, CHAMBRE, PARK, ALDERSON, PATISON and COLERIDGE, maintained the dignity of the Commercial Law of England; while the continual communications of all the Judges, in reviewing the proceedings of the Nisi Prius Courts, preserve the uniformity of the system.

Until of late years, the administration of Commercial Law in Scotland may be said to have rested entirely in the supreme civil Court of Session, unassisted by juries. Being a Court of Law and a Court of Equity, and the Scottish law being grounded on the foundation of the Roman, as a system of universal jurisprudence, the Judges of the Court of Session came readily to apply general principles to the determination of mercantile questions; and, in the writings of Lord STAIR, in the end of the seventeenth century, and in

the decisions of the few mercantile cases which the narrow commerce of his country at that time supplied, those principles will be found admirably stated. It was after the middle of the following century, that Commercial Law may be said to have made any progress, or become an object of attention, in Scotland. But, since that time, many decisions on such cases have been pronounced in Scotland, which would do honour to any court, by the clearness and comprehensiveness of the principles on which they have been adjudged. Not more than a quarter of a century has elapsed, since the introduction of jury-trial in Scotland has produced that happy combination of judicial knowledge and authority, with mercantile and practical experience, in which the chief means of improving mercantile jurisprudence is to be found.

The respect which the Judges of England and of Scotland reciprocally pay to the decisions of each other in commercial questions, together with the influence of the Court of Appeal in the House of Lords, common to both, produces a most desirable uniformity of judgment in all the great points of Mercantile Law; but still, with considerable differences, where the Common law of England, and the principles of the Roman law have led to different views in the doctrines applicable to particular contracts.

The state of Mercantile Jurisdiction in America is not greatly different from that of England; thus tending to the extention of the same uniformity of rule and force of precedent in that great portion of the commercial world. The system of American jurisprudence, being grounded on the common law of England, but with such changes as have been found necessary to adapt its rules and institutions to the peculiar circumstances of the Western Nations, the Judges in the Supreme Courts, in determining any unsettled question in mercantile law, have examined with a liberal and learned spirit, the principles of Roman law, the doctrines and precedents of the English and Scottish laws, and the authorities and decisions in Continental Europe; thus setting an example to the whole mercantile world of the liberality and freedom of inquiry which ought to accompany the settling of every important question. In their books of Reports are to be fornd admirable arguments, delivered from the Judicial Bench, in which the great object is kept in view, of establishing, on a sure footing, and in conformity with what is found to be just in other countries, and consistent with the principles of universal jurisprudence, the rule which the decision of the particular case tends to fix.

In the countries which have been mentioned, no peculiar courts have been instituted for the trial of commercial cases. But in France and in Holland, a system has been arranged in the "Tribunaux de Commerce" for the decision of such causes, with the despatch and economy particularly necessary in such transactions; and a right of appeal is given, under restrictions in point of time, to the "Cours Royals." Thus, the decision is at last reviewed by eminent Judges, and the great principles of Mercantile Law fully secured.

Amidst those different tribunals in different countries, no perfect uniformity has prevailed in the rules and usages which regulate the dealings of trading nations. While some follow the principles of the Roman law (which come nearest, perhaps, of any code of written law, to those of universal jurisprudence,) others have admitted, into the administration of mercantile contracts, some of the peculiar forms and narrower maxims of their municipal law.

A concise view of the differences which have thus arisen, and which

sometimes amount to inconsistency, and are productive of embarrassment in their effects, may be of use, not only in making those differences better known, but in pointing out the cause or principle from which they have arisen, or even, perhaps, in suggesting some reconciling ground on which they may be compromised; and it cannot well be said that the Law-Merchant is a system of universal application, till the great rules, in which all agree, shall be distinguished, and the exceptions and peculiarities marked out for observation.

Such is the object of this work. It is directed to an investigation into the differences which are to be found in different countries relative to the important contract of Sale of goods and merchandise; and it is my intention to extend the inquiry into the other branches of mercantile and maritime law. It differs from those researches into International Law, of which Mr. REDDIE has of late published his profound and learned views.* It is also different from that inquiry concerning the Conflict of Laws, which has occupied so much of the attention of foreign jurists, and in which Mr. Justice STORY has distinguished himself by an excellent treatise.† That department has to deal with cases of private right, professing to settle rules for deciding between parties in different countries relating to personal status, or the effect of contracts which come to be enforced in countries different from those in which they were entered into. It comprehends also such questions as are brought from the Colonies under the appellate jurisdiction of the Judicial Committee of the British Privy Council, a tribunal composed of persons so eminent in the Law, as to give assurance of the most profound knowledge and comprehensive views of those principles which are fitted for all doubtful cases to which the rule of municipal law is applicable.‡ It is thus more extensive in its range, and requiring much more minute detail than that to which I wish to give a beginning: my object being only to investigate the principles on which mercantile usage may be brought more nearly to a common standard in different countries.

* Inquiries in international Law. By JAMES REDDIE, Esq., Advocate, 1842.

† Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies. By JOSEPH STORY, LL.D., Dane Professor of Law in the Harvard University; 2d edition, 1841.

‡ 3d and 4th Will. IV. c. 41. See Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council. By JOHN MACQUEEN, Esq., 1842.

On the subject of colonial law, and the means of discussing such questions, Mr. BURGE has greatly enlightened the profession. See Commentaries on Colonial and Foreign Laws: By WILLIAM BURGE, Esq.; 4 vols., 1838.

# CHAPTER I.

## THE NATURE AND EFFECT, IN GENERAL, OF THE CONTRACT OF SALE, AS RECOGNISED IN DIFFERENT COUNTRIES.

THE term Sale, in a large sense, includes every agreement for the transferring of ownership; whether immediate and direct, or to be completed afterwards. But the effect of the contract is different in these several circumstances.

By the Roman law, which at one time was almost universally followed in Europe, sale was not an immediate transmutation of property, but simply a contract of mutual and personal engagements for the transference of the thing on the one hand, and the payment of the price on the other, without regard to the time of performance on either part; that being left to be regulated by the agreement of the parties, the seller being bound to deliver the thing in property to the buyer at the time and in the circumstances agreed on,—the buyer to pay the price in the manner settled between them.

The distinction was carefully observed in that system between the direct right of property (jus in re) conferred by delivery and possession of the thing sold, and the indirect right (jus ad rem) to demand of the seller delivery of the thing sold. There thus arose from the contract, while the thing sold was undelivered and the price unpaid, the double relation of debtor and creditor *—the seller being debtor, and the buyer creditor, for delivery; the buyer debtor, and the seller creditor, for the price. Corresponding [*10] with these respective obligations, the contract afforded two actions, both personal and direct, as counterparts of each other; the one for payment of the price, the other for delivery of the thing; the claim for the price being absolute on delivery, or tender of the thing; the demand for delivery being conditional—provided the thing had not in the mean time perished without fault of the seller.

According to this view, the principles and practical effects of the law of sale were correctly applicable to all possible circumstances in which goods were to be transferred,—whether the parties were dealing for the transference of a thing present, and at the disposal of the seller; or for a commodity to be measured or weighed out from the seller's warehouse; or for supplies to be collected and delivered in future; or for an article to be manufactured and delivered at a day. In all these cases the contract was effectual, and the respective engagements of the parties were competent to be enforced specifically by counter-actions on the part of the seller, or of the buyer.

This regular system, on which the law of the contract of sale was settled in Roman jurisprudence, continued to prevail in all European nations who adopted the principles of the Roman law.

In France, previous to the Code Napoleon, the law is so laid down by Pothier,(a) Sale he defines as a contract by which "the seller engages to the other that he shall give to him, with an unquestionable title of property, the

(a) Tr. du Contrat de Vente, Nos. 1 & 68.

[*11] thing bargained for, for a certain price in *money, which the buyer engages reciprocally to pay." He afterwards says,—"The contract is executed on the part of the seller, by tradition or delivery of the thing sold," and "the effect of the tradition is to pass into the person of the buyer the property of the thing sold, provided he has paid the price, or credit has been given for it."(*b*)

In Holland, on the same principle, sale was held formerly as a personal contract, completed by consent, but until delivery of the thing sold, the property remained untransferred with the seller, the buyer having only a personal action to compel the transference.(*c*)

In Scotland, the law is precisely the same. Lord Stair says,—"These contracts of permutation, or barter and sale, agree in this, that both are perfected according to law and our custom, by sole consent, naked pactions being now efficacious; and though neither of the things exchanged be delivered, the agreement is valid." Again, he says,—"Sale being perfected, and the thing delivered, the property thereof becomes the buyer's, if it was the seller's."(*d*) Erskine says,—"Though the contract is entered into and perfected with a view of transferring the property to the buyer, it is not actually transferred, but remains with the seller or vender till the delivery of the subject."(*e*)

Great deviations from this system (which regarded sale in all circumstances as a personal contract) have been made in England, America, modern France, and Holland. Sale, when relative to things in the seller's possession and ready for delivery, is held to be itself a *transference or transmutation of the property, not a personal contract merely; while an executory sale (that is, a sale to be completed at some future time,) as a mere contract, is effectual to raise the counter obligations of delivery and of payment at the terms agreed on, the subject being afterwards procured or prepared, or manufactured for the occasion.

[*12]

Blackstone defines sale as "a transmutation of property from one man to another in consideration of some price or recompence in value."(*f*)

In America the same law is adopted.(*g*)

In France, under the Code Civile,(*h*) the property is passed in law by the completion of the contract between the parties.

In Holland the doctrine, as adopted under the later French law, was followed, and does not seem to be altered by the modern Code de Commerce de Hollande.

The deviation thus introduced from the regular system of Roman jurisprudence has thrown into some confusion the doctrine of sale, and occasioned a degree of obscurity in the very use of terms. To those who have been accustomed to the writings of the Civilians, or of older French, or of Dutch,

(*b*) Pothier Tr. Cont. de Vente, Nos. 312 & 318.
(*c*) Van der Linden, b. i. c. 15, § 9. (*d*) 1 Stair, 14, 1.
(*e*) Ersk. 3, 2.
(*f*) 2 Blackst. 446. I do not find in the works of English Lawyers any explanation of the grounds of their departure from the system of the Roman law in this matter. It may have arisen from the separation of the jurisdiction in law and equity, the Common Law Courts having no machiney by which to enforce specific performance of obligations under the action of assumpsit, and being induced to bring the seller's engagement within the reach of an action of trover by fixing the property to have passed by the mere contract.
(*g*) 2 Kent, Com. 492. (*h*) Code Civile, § 1583.

or Scottish Jurists, it is a *startling proposition to read in an English law-book that a bargain for the purchase of goods expected by a certain ship is no sale. The English lawyer, accustomed to understand as sale only the immediate transmutation of a specific article, is startled in his turn when he reads in a Scotch law-book that a sale may take place of the things not yet prepared or collected by the seller—the produce of a fishing voyage, or the cast of a net. [*13]

And yet this deviation is not productive of any essential practical consequence except in two respects.

1. The effect of the obligation by the seller to deliver the specific thing sold, is, according to the law of personal obligations in Scotland, to throw the risk of the thing perishing without the seller's fault, on the buyer; and so is precisely the same with the effect which, in the English law and other laws mentioned, is produced by the fiction, that the property is vested in the buyer though still in the possession of the seller. But an important point of difference is this,—that on the bankruptcy of the seller with the thing still in his possession, his creditors, by the English system of law, have only a lien for the unpaid price, the property being held as already transferred to the buyer; while, in the Scottish, the creditors are entitled to consider the property as still untransferred from the seller, leaving the buyer to claim as a personal creditor for the price, if paid or settled by a bill discounted, or for damages for nondelivery. This is an unhappy and unjust consequence of the general principle of the Scottish law, against which a man can guard himself only by vigilance and precaution; and it has seemed sufficient to the legislators of France, America, and Holland, to make them adopt the anomalous rule of *English law belonging to a system of jurisprudence different from their own. [*14]

2. The other remarkable difference is this,—that in England and America, though the thing be still in the possession of the seller, yet the property being passed, the remedy of the buyer, in case it shall be found, on coming to his possession, not to answer to the implied or express warranty, is only to claim indemnification for the difference in value of the thing purchased: But in Scotland, the property not being passed, and the parties remaining still under the obligations of the personal contract, the buyer is entitled to reject the thing if it do not answer to the warranty, as not being that which the seller is under an obligation to deliver.

In the inquiry into the difference thus observable in different countries, it will be proper to consider the several cases of sale, 1. Where certain specific goods are ready for delivery; 2. Where something still remains to be done, as weighing or measuring; 3. Where the agreement is prospective, as relative to goods to be afterwards collected and furnished; and, 4. Where the thing to be transferred is to be manufactured, or otherwise prepared for the purchaser.

1. *Sale of specific goods ready for delivery.*—From what has been already explained, the doctrine, according to the law of all the countries referred to, applicable to a sale where goods ready for delivery are intended to be immediately transferred to the buyer, may be laid down in the following propositions:—

1st. Where the parties are conclusively agreed, the one to sell, the other to buy, and delivery accordingly is made, the property is passed: as when

[*15] one enters the *shop of a jeweller and buys, pays for, and carries off a ring.

2d. Where delivery is not made, but at the request of the buyer, or for the convenience of the parties, the thing sold is left with the buyer, the property is, in England, America, France, and Holland, passed; and the seller is a mere custodier for the buyer, with a lien for the price, the buyer having his remedy by assumpsit for damages, if the thing does not answer to the warranty. But in Scotland the real right of property is with the seller till delivery, and the buyer has only a personal right, or *jus ad rem specificam*, entitling him to an action for delivery, and to refuse acceptance if the thing does not answer to the warranty; and, on the other hand (there being nothing but an obligation on the seller to deliver,) the risk is with the buyer, if, by accident, the thing perish before delivery.

2. *Sale of a quantity of goods to be separated from a mass.*—Where a bargain is made for a quantity of goods to be separated from a general mass, as for 100 quarters of grain to be delivered from a larger quantity in the seller's granary, this is a proper contract of sale in Scotland. But in England it is not sale,—it is merely an agreement which will ground a personal action of assumpsit.

In Scotland, the *jus ad rem specificam* is not conferred, and, of course, the risk remains with the seller.(*i*) In England, neither the property nor the risk is transferred, while any thing remains to be done by the seller,(*k*) and

[*16] *no direct action of trover for the goods, as if transferred, can be maintained by the buyer.

Where, under such an agreement, the separation of the goods for the buyer is made, and notice given of it, the sale is complete, as of a definite subject; and the risk is then passed, both in Scotland and England; but in the latter the property is vested in the buyer—the right of possession being still with the seller.(*l*)

The law of America agrees in these respects with the law of England.(*m*)

3. *Sale of goods to be collected and furnished.*—Where the contract is for goods to be collected and furnished to the buyer, it is not in England regarded as a sale, nor is there any transmutation of property or risk even after the articles engaged to be provided are collected, and in the contractor's possession. Neither is there in Scotland any *jus ad rem specificam*, or change of risk, where the goods are collected but still undelivered. Thus, a contract for supplying a regiment, or an hospital, with provisions, is a good contract of sale, according to the sense of the Scottish law, the counterparts of the contract being quite consistent with the recognised principles of sale both in the Roman and in the Scottish law. But it does not accord with the notion

[*17] of sale in England, and no action would lie on such a contract if *the seller had not the goods at the time, but intended to go into

(*i*) 3 Ersk. 3, 7.

(*k*) Hanson v. Meyer, 6 East, 614; 1 Bell's Illus. p. 90; Simmons v. Swift, 5 Barn. and Cress. 857; 1 Bell's Illus. p. 90.

(*l*) Rhode v. Thwaites, 6 Barn. and Cress. 392. I should be inclined to doubt whether the words reported to have been used by Mr. Justice Bayley in that case were really used by him. May they not be regarded as too absolute, that "as soon as the seller appropriates part for the benefit of the vendee, the property of the article sold passes to the vendee." Is it not necessary that he should also send notice of such appropriation? In the case in which the judgment was given, such notice was sent and acquiesced in.

(*m*) 2 Kent, Com. 491, et seq.

the market and buy them.(*n*) The same rule seems to be held in America.(*o*)

4. *Sale of goods to be manufactured or prepared.*—Where one bargains with a manufacturer for the making and delivering of certain goods, to be ready at a certain term, this is another kind of agreement, combining the obligations of a contract of sale with those of the contract of locatio operis. Here the appropriation does not take place by the commencement or progress of the work, so as, in England or Scotland, to pass either property or risk; and the consequence in England is, that the property not being passed as in proper sale, the buyer has it in his power to reject the thing when proffered for delivery, if it do not answer to the order given, and is not compelled to be satisfied with a claim of indemnification for the difference of value.

But a case has occurred in which special acts of appropriation have had the effect, in both countries, of a proper sale in passing the property. In a case of ship-building, where the carpenter was to receive instalments of the price at appointed stages of the work, one at laying the keel, another at planking to the top of the gunwale, and certain instalments had been paid when a bankruptcy of the carpenter occurred, the property was held as passed by the appropriation of the parts paid for.(*p*)

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## *CHAPTER II. [*13]

### ESSENTIALS OF SALE.

It is indispensable to the contract of sale that there shall be, 1st, a price in money to be paid by the buyer to the seller; and, 2d, a legitimate commodity to be sold by the one party, and purchased by the other. In these respects there is little difference in the laws of the several commercial nations, —England, Scotland, America, France, and Holland.

In the requisite of a money price, the proper contract of sale is distinguishable from barter or exchange in which one commodity is given for another. But in no other respect is this distinction of any practical importance.

### I. *The Price.*

The price is an essential part of the contract; and in price lawyers have distinguished two requisites, 1st, that it shall be certain, or at least capable of being immediately ascertained; and, 2d, that it shall not be illusory.

1st, The price must either be fixed, as a certain sum of money,(*a*) or

(*n*) Bryan v. Lewis; Ryan and Moody, 386; 1 Bell's Illus. p. 113.

(*o*) 2 Kent, Com. 468, foot-note.

(*p*) Simpson v. Duncanson, 2d Aug. 1786; Mor. 14204; 1 Bell's Illus. p. 384. Woods v. Russel, 1822; 5 Barn. & Ald. 942; 1 Bell's Illus. p. 385.

(*a*) See for England, Elmore v. Kingcote; 5 Barn. and Cress. 583. For Scotland, 1 Stair, 14, 1; and 3 Ersk. 3, 4. For America, 2 Kent, Comm. 477. For France, Pothier Tr. de Vente, No. 18; Duvergier (continuation of Toullier), vol. xvi. p. 167; Pardessus, Cours de Droit Commercial, vol. ii. p. 280, No. 273.

[*19] referred to a standard by which it may be *ascertained, without further negociation between the parties. So it may be referred to the list of current prices in the market on a particular day; or the award of an umpire; or the opinion of a broker or other person of skill. This is law in all commercial countries.(b)

The price may be either a sum for the whole subject sold, or rateably at so much per ton, or pipe, or hogshead, or quarter of grain; and then the only question that can be raised will relate either to the denomination of money specified, or to the rate of exchange between one country and another, or to the measurement of the goods to which the stipulated rate of payment is applicable; but the degree of uncertainty depending on these circumstances does not unfix the price, or enable the party to withdraw from the contract.(c)

But although the general rule be that the price must be fixed, and that the parties will not be bound, if it be not so, yet, where the contract has been conclusively settled by delivery of the goods sold, the parties will be presumed in law to have had in contemplation the reasonable value of the thing sold. This has been held in England, and he who has got the goods into his possession is not allowed to keep them without payment of that reasonable value.(d) Tindal, Chief-Justice, after having laid it down that a contract for the sale of a commodity, in which the price is left uncertain, is in law a

[*20] contract for what the goods shall be found to be *reasonably worth, and referring to Blackstone, Book ii. chap. 30, p. 433, for the doctrine of implied agreement, adds, "What is implied in law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."

In Scotland, also, it has been held, that where nothing has been said as to the price in a sale conclusively settled between the parties, merchants are presumed to contract according to the current prices of the country.(e)

The biddings at an auction fix the price, provided no unfair means be taken to enhance it on the one hand, or to depress it on the other.

Where the price is fixed by the parties, but the term of payment left uncertain, it is presumed to be a ready money bargain; for although the custom of trade may allow a credit in that particular commodity, that always proceeds on the supposition of the seller's reliance on the solvency of the buyer, and to admit such credit without express agreement would be to imply the seller's consent to trust to the solvency of the buyer. Accordingly, in England it has been settled, "If a man agree for goods at such a price, the bargain shall be void, if the money be not paid immediately."(f) And Blackstone says, "It is no sale without payment, unless the contrary be expressly agreed."(g)

(b) 2 Pardessus, p. 283, No. 275, et seq.; 1 Stair, 14, 1; 3 Ersk. 3, 4; 2 Kent, Com. 477; 2 Blacks. 446; Pothier Cont. de Vente, No. 24.
(c) Graham v. Jackson, 1811; 14 East, 498.
(d) Acebal v. Levy; 10 Bing. 382; Hoadly v. M'Laine, 1834; 10 Bing. 482; 1 Bell's Illus. p. 95.
(e) Leslie v. Miller, 27th January, 1714; Mor. 14197; 1 Bell's Illus. p. 95.
(f) Comyn's Dig. "Agreement;" B. 3.
(g) 2 Blacks. 447. Mason v. Lickbarrow; 1 Hen. Blackst. 363. Morton v. Lamb, 1797; 7 T. Rep. 125; 1 Bell's Illus. p. 96; Rawson v. Johnson, 1801; 1 East, 203; 1 Bell's Illus. p. 96.

*In Scotland the same rule has been recognised in a case(*h*) where a quantity of malt having been sold at so much per boll, it [*21] was held to be the rule, that the sale was for ready money, unless it could be proved that credit was given.

2d, As the price must be certain, so it must be just and reasonable, not merely nominal; for then, instead of sale, the dealing between the parties would be of the nature of donation, the effect of which would depend on other principles. But although this be law, as in a question with creditors or third parties, yet between the parties themselves or their representatives, such a price as the seller has declared himself satisfied to receive for his goods will be sufficient. "Every price" (says Erskine, and the principle seems to be applicable in all countries as well as in Scotland,) "which the parties have agreed upon, is in the judgment of the law just, if they have not been drawn into the contract by fraud or deceit."(*i*) This is law in England and America,(*k*) as well as in France, Scotland, and Holland.

As to the conditions sometimes annexed to the payment of the price, relative either to the term of credit or the description of bill, see below, "Of Express Conditions," p. 110.

## II. *The Subject.*

The most important requisite in sale is, that it shall be a lawful subject of traffic.

Whatever may be the true principle of legislation as to interference in the free traffic of commodities, there can *be no doubt that each inde- [*22] pendent State has full power to impose such duties as may be required for its revenue, or such prohibitions or impediments as may be thought necessary for the protection of particular branches of trade or industry. The breach of all such regulations is unlawful, and no contract for the accomplishment of such breach of the law is a legitimate ground of action. The principle on which the administration of justice in such cases is regulated is, that no court shall lend its aid to an action grounded on an illegal contract, and the maxim of law laid down for such cases is Potior est conditio possidentis vel defendentis.

Two branches in this department of national policy may be distinguished; one including the regulations of the duties of customs on exportation and importation; the other relating to the war policy of the country.

Smuggling Contracts.—In Great Britain many rules relative to importation and exportation duties have been established, the breach of which is smuggling or contraband trade.(*l*)

The result of all the cases on this subject seems to be,—

(1.) That no contract for importing or exporting goods in order to defeat the revenue laws, can be enforced, whether the person so acting be a native or a foreigner.

(2.) That the mere sale by a merchant abroad, whether a native of this country or a foreigner, of goods which the buyer afterwards smuggles into

(*h*) Arnott v. Watt, 12th May, 1825; 4 S. 4; 1 Bell's Illus. p. 105.
(*i*) 3 Ersk. 3, 4. (*k*) 2 Kent, 476.
(*l*) 6th Geo. IV., c. 107 and 108; 3d and 4th Will. IV., c. 52, 53. 56; and 4th and 5th Will. IV., c. 89. See also 5th and 6th Vict., c. 47.

[*23] this country, *is not illegal, nor is action denied upon the contract to the seller.(m)

(3.) That every one participant in the attempt to evade the revenue laws, by furnishing the means of facilitating the intention to smuggle, is to be held a party to the illegal contract, and action is denied to him.(n)

(4.) That in the balancing of evidence, the circumstance of the seller being a native gives a bias against him.(o)

(5.) That, on a sale of goods prohibited to be imported, or known to be smuggled, action will not be sustained for the price on the one hand, or for the delivery of the goods on the other.(p)

(6). That the purchase in bona fide of goods not prohibited, but which have been smuggled, is effectual.(q)

CONTRACTS INCONSISTENT WITH WAR POLICY.—The general principle which, according to the approved doctrines of international law, regulates [*24] the whole of this *department, is, that war is an instrument of national policy under the guidance of the governing power of the State for the attainment of public good, and that on no pretence of distress or annoyance to individuals can this course of policy be interrupted. All traffic between the traders of the belligerent countries is forbidden, and no contract, therefore, which counteracts this course of national policy can be sustained as a ground of action; and ships, and goods found engaged in traffic with the enemy, are forfeited, as the best and most natural way of repressing the attempts of speculators in such traffic. These principles are recognised in Great Britain, France and America.

The administration of this department of jurisprudence by Lord Stowell is illustrated in the series of reports cited below;(r) and the principles now stated prevail throughout the whole series, and have been almost universally approved of in commercial nations.(s)

But it is not merely on a contract made during war with the belligerent country that action is refused. Even where the contract has been made during peace, war intervening before the action has been brought, suspends the demand for the price, or for the goods till the return of peace, on the principle that without express license of the government the hand of the enemy is not to be strengthened by funds derived from the belligerent country.(t)

[*25] *But although there can be no legitimate traffic between the traders of the belligerent countries without express license by govern-

(m) Hollman v. Johnston, 1775; Cowper, 341; 1 Bell's Illus. p. 69. Cullen and Co. v. Phillips, May, 15, 1793; Mor. 9554; 1 Bell's Illus. p. 68.

(n) Clugas v. Penaluna, 4 T. Rep. 466; 1 Bell's Illus. p. 70; Waymell v. Reed, 5 T. Rep. 599. MacClure & M'Cree v. Paterson, Nov. 3, 1775; and Feb. 26, 1778; Mor. 9546; 5 Br. Sup. 532; 1 Bell's Illus. p. 67. Stoddart v. M'Queen, Jan. 28, 1779; 5 Br. Sup. 533; 1 Bell's Illus. p. 68. Nisbett's Creditors v. Robertson, Jan. 1791; Mor. 9554; Bell's Cases, 349; 1 Bell's Illus. p. 68.

(o) Cantly v. Robertson, Feb. 11, 1790; Mor. 9550; 1 Bell's Illus. p. 68.

(p) Scougal v. Gilchrist, Nov. 16, 1736; Mor. 9536; 1 Bell's Illus. p. 67. Biggs v. Lawrence, 3 T. Rep. 454; 1 Bell's Illus. p. 69.

(q) M'Lean v. Sword, Dec. 5, 1788; Mor. 9549; 1 Bell's Illus. p. 67.

(r) Robinson's Admiralty Reports, 1798-1808; Edwards, 1808-1811; Dodson, 1811-1822.

(s) 3 Vattel, 5, sec. 70; 2 Stair, 2; 1 Kent, Com. 55.

(t) In America this maxim has been carried a great deal further, an immediate confiscation of all property or debts belonging or owing to subjects of a country at war with the United States has been judicially sanctioned by the American Courts of Law, leaving redress to be obtained from Congress, according to its discretion in the circumstances. Brown v. The United States, 8 Cranch, 110. Ware v. Hyton; 3 Dallas, 199; 1 Kent, Com. 56.

ment, there is no hindrance to the trade of neutrals with either belligerent, or even between the belligerent countries.(*u*)

The prohibition of direct trade between the belligerents may be removed by license. The granting of such license is an act of the supreme power of government, according to the discretion or views of policy which it may entertain. In all former wars, licenses granted by the government of Great Britain were interpreted very strictly by the Court of Admiralty, but in the extraordinary state in which Europe remained for some time during the reign of Napoleon, Government granted licenses more freely, and the judicial construction of them was greatly relaxed in strictness.(*v*)

Assuming that there is no illegality in the transaction, and referring to the distinctions which have been already noticed generally,(*w*) we shall now inquire into them more particularly.

1. *Sale of a Specific Subject.*—Both by the Roman law, and that of every modern nation, if the parties have bargained for the sale of a commodity, supposed to exist at the time, but which has perished, *the contract is void; as where a sale is made of a quantity of sugar, or of corn, warehoused in a certain place, and the corn or sugar has been consumed by fire some days before the sale.(*x*) [*26]

But there may be a sale of a contingency, of that which by possibility the seller may acquire,—as by the cast of a net, or by a fishing or Greenland voyage. Here it is not the commodity, but the spes, which is the subject of the bargain.(*y*) The goodwill of a shop, tavern, &c. has, in England, been held a legitimate subject of sale; and even a confidential employment of law-agent has been so held.(*z*)

The peculiar view which has in England and America been taken of sale, as an immediate transmutation of the subject of it, has led to a remarkable difference of doctrine as to the sale of things not in the power or possession of the seller at the time.

In those systems of law in which the distinction is preserved between sale as a transference, and sale as a contract, it is held that even a thing which belongs to another may be the subject of sale. In the civil law, the former law of France, the law of Holland, and that of Scotland, such sale is held effectual as a contract, binding the seller to acquire the thing bargained for, and make it good to the buyer, in fulfilment of his contract, or to pay damages for any loss sustained by the failure.(*a*)

In England and America, and in modern France, *sale, being not a contract merely, but a transmutation of the subject, cannot take place as to property not belonging to the seller at the time.(*b*) As to France, this doctrine must be taken with some qualification, in so far as applicable to [*27]

(*u*) 3 Vattel, 4, sec. 63; 1 Emerigon, 567.

(*v*) See the administration of this department well explained and illustrated in the Goede Hoop, Edw. Ad. Rep. 327.

(*w*) Ante, p. 10, et seq.

(*x*) 18 Dig. t. 1, l. 57: Pothier, Cont. de Vente, No. 4. See also Hitchcock v. Giddings, 4 Price's Rep. 135; 2 Kent, Com. 468.

(*y*) Pothier, Con. de Vente, No. 5; 3 Ersk. 3, § 3.

(*z*) Bunn v. Guy, 1803; 4 East, 190.

(*a*) 18 Dig. tit 1, l. 57; Pothier, Tr. de Vente, No. 7, and Tr. des Oblig. No. 138; 1 Stair, 10. 13 (Thirdly.)

(*b*) Code Civil, No. 1599; Duvergier, vol. 16, p. 205, et seq.; 2 Kent, Com. 468.

goods and merchandise; even as respects immovable property, the contract is null as as a transference, but it still exists as an obligation entitling the buyer to damages;(c) as to merchandise which can be purchased in the market, the seller is held bound to fulfil the contract.(d)

2. *Sale of a quantity to be taken from a larger.*—In the sale of articles indefinitely to be taken from a heap, the effect is very different from that which attends the sale of a specific and identified subject. In this case, the property does not pass either according to the law of England, America, or France: nor is the risk on the buyer according to the law of Scotland and Holland. The questions which may naturally arise, will depend upon the criterion by which the subject is to be identified, and made specific to the buyer, and the time at which this change will take place.

The identity is in general proved by a sample taken from the heap, and sealed up, to be opened at the time of delivery; where the quantity from which a part is to be taken is not thus identified, but assurance given of a certain quality of goods, samples are sometimes drawn and delivered to the buyer, not to prove the identity of the bulk when delivered, but to serve as a test of the quality of the goods intended to be purchased.

[ *28 ] *The ascertainment of the subject, so as to complete the contract and change the risk or pass the property, as if the bargain had been originally for a specific subject, is accomplished by the separation and setting apart of the subject for the buyer, with notice to him that it is so set apart. Where the portion is to be separated from a heap, cargo, or larger quantity, —as a number of quarters from the corn in a granary; or the measuring out of a liquid; or of a portion from a web of manufactured cloth; or the weighing of the proposed quantity of goods sold by weight,—this operation is materially affected by the laws relative to weights and measures, which of late years have been in Great Britain placed on a new footing.

By the 5th Geo. IV., c. 74, § 15, and 6th Geo. IV. c. 12, it was enacted, that after the 1st January, 1826, work to be done, or goods, wares, merchandise, or other things to be sold by weight or measure, where no special agreement was made to the contrary, should be held to be according to the standards ascertained by that act; and that where any special agreement was made with reference to any weight or measure established by local custom, the rate or proportion which such local weight or measure should bear to the standard should be expressed, declared and specified in the agreement, otherwise it should be null and void. Under this act great negligence was committed in preparing standard weights and measures, and much looseness of proceeding and consequent litigation arose under the permission to use the old standard, provided the ratio were stated. A new act was therefore passed, 5th and 6th Wm. IV. c, 63, repealing the former acts, and introducing new provisions; and,

[ *29 ] (1.) *Provisions are made for verifying and adjusting the standard models erroneously made under the former act.

(2.) The Winchester bushel, Scotch ell, and all other local and customary measures, are abolished.

(3.) Heaped measures are abolished, as liable to great variations.

(4.) The stone weight is regulated at fourteen standard pounds avoirdupois;

(c) Duvergier ut supra, No. 217. (d) Code Civ. No. 1617; 16 Duvergier, 271.

a hundred weight at eight such stones; and a ton at twenty such hundred weight. And it is provided, that no one shall sell by any other weights or measures than the imperial weights or measures prescribed by the act, under a penalty; but commodities sold in a vessel, not specifying any particular measurement, are excepted.

The provisions of this put an end to such questions as occurred under the former, whether a bargain was void, in which the ratio between the local measures by which the parties settled their contract and the imperial measures was omitted.

Lord Tenterden, in delivering the judgment in such a case,(*e*) said, "I cannot forbear observing, that if a contract for a sale by the Winchester bushel is to be deemed valid, the object of the statute will be in a great measure defeated." It was to put an end to such doubts that the Winchester bushel and all other local weights and measures were abolished.

It may, however, be observed, that where the measures and weights are different in the place of the contract and in that of delivery; or in the country of the buyer and in that of the seller; or in that where the order *is given and that in which the merchant resides to whom it is addressed; a question may arise by which of the standards the quantity is to be estimated; and in a case of this sort in Scotland, the matter was held to depend on the port of delivery.(*f*) [*30]

In sales of goods by quantity or weight, there sometimes occurs an ambiguity of phrase relative to the thing sold which requires the interpretation of custom or of the Court. Thus, where a bargain was for "*about* 300 qrs. *more or less*" of foreign rye of good merchantable quality, at 38*s.* 3*d.*; also, "*about* 50 qrs. of foreign red wheat," &c., at 72*s.* per quarter, shipped on board the Anna Elizabeth, &c.; the ship arrived with 345 qrs. of rye, and 91 qrs. of wheat. The question was, whether the defendant was, under the words "*more or less*," and under the word "*about*," bound to take so large an excess over the expressed quantity. The Court of King's Bench held that this was not a question on which mercantile evidence was to be let in, the words not being technical, but for the Court to construe. And as to the meaning of the contract, they held,—1. That it did not fairly mean all that the ship could bring, or the seller send by her; 2. That in common construction it could not intend so large an excess, and that as it lay on the sellers to shew that such an excess was meant, if from obscurity they failed in this, they could not succeed in binding the buyer to take it.(*g*)

3. *Sale of a quantity of goods of known description.*—Where the subject either offered by the seller, or *ordered by the buyer, is a commodity known by a certain name in the market, the subject, when furnished, must correspond with that description; as in two cases where *sassafras wood* in the one, and *scarlet cuttings* in the other, were terms held to be descriptive in the market, of a particular species of commodity, with which that furnished by the buyer did not agree. [*31]

4. *Sale of a subject to be provided.*—Where the subject of the bargain is to be afterwards provided, collected, or manufactured, and delivered to the

(*e*) Watts v. Friend, 1830; K. B.; 10 Barn. and Cress. 446; and 1 Bell's Illus. p. 94.
(*f*) Schurmans and Son v. Stephen, 18th July 1832; 10 S. 839; and 25th June 1833; 11 S. 779; 1 Bell's Illus. p. 93.
(*g*) Cross v. Eglin, 1831; 2 Barn. and Adolph. 106; 1 Bell's Illus. p. 94.

buyer, the contract is not null, as in the case of a proper sale, but effect is given to it only in certain circumstances. Thus, where one sold a quantity of nutmegs which he had not in his possession, but meant to go into the market and buy them, in order to fulfil his contract, Abbott, Chief Justice, said, "I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered at a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods, which he has contracted to deliver, he cannot maintain an action upon such a contract. It amounts, on the part of the vender, to a wager on the price of the commodity, and is attended with the most mischievous consequences."(*h*)

In America, the same doctrine seems to be approved of.(*i*)

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[*32] *CHAPTER III.

PROOF OF THE CONSENT OF THE PARTIES.

SALE is a mutual and reciprocal contract, in which both parties are bound or neither. Proof of their mutual consent and engagement is the first essential point in all actions on the contract. But there may be a preliminary negociation towards a sale, out of which, although as a sale it may prove abortive, there may arise an undertaking by one of the parties, from failure to fulfil which, disappointment and loss may arise to the other, and an equitable right to demand either the completion of the contract, or indemnification of the loss incurred by the disappointment.

It may, therefore, be proper to consider, 1st, the proof of such preliminary negotiation and undertaking, with the effect which is given to it in different countries; and, 2d, the proof of the complete contract of sale.

### 1. *Proof and Effect of Preliminary Negociations.*

The preliminary proposals and negociations for a sale may consist either in an Offer to purchase or sell, made verbally, or by letter; or in an Order for goods sent to a dealer who professes to have such goods to dispose of.

OFFER.—An offer to buy, or to sell, goods, when accepted, forms the con-
[*33] tract of sale; while unaccepted, *it may infer an obligation on the offerer, from which, if he retract unduly, disappointment and loss may arise to the other party, and equitably a ground of action to the person to whom the offer is made.

Whether such an action is maintainable is a question differently adjudged in different countries. In those countries which have followed the principles

(*h*) Bryan v. Lewis, 1826; Ryan and Moody, 386; 1 Bell's Illus. p. 113.
(*i*) 2 Kent, Com. 468.

of the Roman jurisprudence, such action is admitted; but in England and America, proceeding on the common law of England, it is denied.

In inquiring into the principle upon which this matter ought to be settled, it is proper, in the first place, to distinguish between mutual contract, and unilateral obligation. In a mutual contract both parties must be bound or neither; but by a unilateral engagement one may bind himself to another. In England, no parole engagement is effectual, unless it either be for a consideration, or as part of a mutual contract; a promise or engagement, in other circumstances, being regarded as *nudum pactum ex quo non oritur actio.* France, Scotland, and Holland, an engagement duly made is binding on the party without regard to the consideration on which it has proceeded. And it seems inconsistent with the plain principles of equity, that a person who has been induced to rely on such an engagement should have no remedy in case of disappointment. If, for example, a merchant propose to sell to another a cargo of sugar or of tobacco, and agree to give him a certain time to determine whether he will buy the goods or not, engaging not to dispose of them till the time has elapsed, and in the meanwhile he dispose of them, and disappoint the person to whom the promise has been made, who may have rejected an advantageous offer *from another dealer, it seems unjust that for the disappointment thus occasioned there should be no remedy. [*34] The only answer to this in the English law, appears to be, that no one is entitled to rely on a unilateral engagement gratuitously made and without consideration. But one cannot help feeling that a rule so different from what commonly happens in the intercourse of life raises that inconsistency between law and justice which is sometimes complained of. The subtleties of lawyers never ought to interfere with the common sense and understanding of mankind; and the law is on a better footing where an engagement, seriously made, is by the law enforced, without regard to the motive from which it proceeds.

"In France," says Touiller, "when he who makes an offer has fixed a determinate time for acceptance, or has expressly or tacitly engaged not to revoke before the answer of the other party, the promise is not revocable during the terms; so, if I offer to you 100 pipes of wine at a certain price, and add that I wait your answer before selling them to another, I cannot revoke my offer before the time necessary for having your answer. But if that answer is unduly delayed, I regain my freedom, which I had suspended only for a limited time."(*a*)

In Holland, where the rules of the Code Civile are law, unless in so far as altered by the Code de Commerce de Hollande, the same doctrine may be held as established.(*b*)

In Scotland the same doctrine prevails. Lord Stair *says, "An offer hath the implied condition of the other party's acceptance." "So [*35] that, if the acceptance be not adhibited presently, or within the time expressed in the offer in which the other party hath liberty to accept, there ariseth no obligation."(*c*)

The doctrine thus established in France, in Holland, and in Scotland, rests upon the principle, that a promise is binding as a unilateral engagement, and

(*a*) 6 Toullier; Le Droit Civile Français, p. 33, No. 30.
(*b*) Code de Commerce de Hollande Dispositions Générales, Art. I. p. 65.
(*c*) 1 Stair, 3. 9.

that an offer is a conditional promise or engagement if duly accepted. Therefore, although there is no action, as upon a mutual contract, the unilateral engagement is effectual to bind the offerer till discharged by rejection of the offer, or by expiration of the time allowed for acceptance.

In England, this doctrine, which seems consistent with good faith, stands opposed to a maxim of the old common law, which mercantile usage does not appear entirely to have overturned. By that law a promise is *nudum pactum*, and an offer is regarded only as a promise not binding on the offerer.(*d*)

The distinction already taken notice of between a mutual contract and a unilateral engagement, leads to this further consequence, that an offer still unaccepted, while it binds the offerer in the French, Dutch, and Scottish law for any damage which may arise from undue refusal to fulfil the engagement, does not bind the commodity (not yet specific and identified) to the person to whom the offer is made, so that if the offerer should sell it to another, there is no right in the buyer to demand delivery; or if it should perish
[ *36 ] before acceptance *of the offer, the loss could not be laid upon the person to whom the offer is made. But an offer accepted is, by the law of England, as well as by that of France and Scotland, binding from the moment of acceptance, such acceptance completing the contract of sale and forming the reciprocal engagement on either party which distinguishes the mutual contract from the unilateral engagement. The acceptance is duly made if it take place before the offer has been recalled. And so in England, where an offer of a commodity "requiring your acceptance in course" was made by a letter, which being misdirected, did not reach the correspondent till the day after it should have been delivered, and he having accepted the moment he received it, the Court held that the offerer was bound by the contract as duly accepted, although not having received the answer to his offer "in course," he had in the meanwhile sold the commodity.(*e*)

It may be observed, that an offer duly accepted will have a different effect, according as the subject of the offer is a specific commodity, or indefinitely part of a larger quantity. In the former case, from the moment of acceptance the risk of the commodity is with the buyer; in the latter, the goods continue in all senses the property and at the risk of the seller.

Two points remain on this subject,—What is the proof of acceptance of the offer? What is sufficient to bar revocation?

(1.) Where acceptance is by word of mouth between the parties or their agents, parole evidence of such acceptance will be sufficient in France, Scot-
[ *37 ] land, and *Holland. In England and America, proof by a note in writing, signed by the parties or their agent, or parole proof with earnest, part payment or part delivery, is necessary.

Where the transaction is between parties at a distance, correspondence by letter is the natural evidence; but silence or compliance on the part of the offeree may be a sufficient acceptance. As if one offer to sell and send goods to another unless forbidden in course of post, or before a certain day, and no notice of such forbidding is received by the time limited, the offeree is bound as having accepted. Or if, on the other hand, one offer to buy goods at a certain price, provided they are sent, or a bill of lading trans-

(*d*) Cooke v. Oxley, 3 T. Rep. 653. See also Routledge v. Grant, 4 Bing. 653.
(*e*) Adams v. Lindsell, 1 Barn. and Ald. 681; 1 Bell's Illus. p. 86.

mitted by a certain day, the arrival of the goods or of the bill of lading binds the offerer.(*f*)

If the offer should be accepted with a condition annexed, that is no acceptance, but substantially a new offer requiring acceptance on the part of the original offerer. For example, an offer is sent of a commodity at a certain price and at three months' credit, and the correspondent accepts on condition that the credit be extended to six months; the offerer is not bound, for this is no acceptance, and requires either an acceptance by the original offerer or acquiescence in the change.(*g*)

*(2.) As to what shall be required to bar revocation on the part of the offerer, this may be either by an express agreement not to revoke till a certain event, or by the limitation of time for the acceptance of the offer. [*38]

Where an offer is made, and the offeree asks a certain time within which to refuse or accept, the offerer, if he agree to grant the time, is barred from revoking till it shall expire.(*h*)

The counterpart of the above rule is, that the offer is discharged, and the offerer free by the expiration of the time limited without acceptance.(*i*)

Order.—Where a merchant sends to his correspondents price-lists of goods which he has so disposed of, inviting them to give him an order, this is construed as an offer to sell those goods at the rates fixed in the price-lists, and an order sent in course of post will bind the person thus acting. But where there is no special engagement to keep the goods undisposed of, the correspondent is not entitled to rely on his order being complied with as if it were the acceptance of a specific offer. It is only by an acceptance in course of post, or by tacit agreement, that the bargain will be concluded, or the person who sends the order entitled to damages.(*k*) When an order is sent in the above *circumstances, it may be rejected, and the person to whom it is sent is bound so to do in due course of post; but if not rejected, the person who sends it will be entitled to take it for granted that it is accepted, and to rely on the goods being sent. [*39]

## 2. *Proof of the Contract of Sale.*

Different proofs are required in the Courts of Law of different countries for establishing the agreement for the sale of goods.

The most peculiar are those required by the law of England, and of America. Scotland, France, and Holland, are in general regulated by the principles of the Roman law in admitting parole as well as written evidence.

### (1.) Of sales in which writing *is indispensable.*

(*f*) 2 Pardessus, No. 253. Lombe v. Scott, 17th Nov. 1779. Mor. 5627; 1 Bell's Illus. p. 84. See also Farries v. Stein, March 7, 1799; Mor. 8482, as reversed in the House of Lords, March 24, 1800; 1 Bell's Com. 326; 1 Bell's Illus. p. 85.

(*g*) Jacques, Serruys, and Co. v. Watt, 12th Feb. 1817; Fac. Coll.; 1 Bell's Illus. p. 84. M'Neill v. Cameron, 21st Jan. 1830; 8 S. 362; 1 Bell's Illus. p. 84.

(*h*) Jaffrey v. Boag, 7th Dec. 1824; 3 S. 266; 1 Bell's Illus. p. 85. Watson and Co. v. O'Reilly and Co., 16th Feb. 1826; 4 S. 480; 1 Bell's Illus. p. 85. See the case of Cooke v. Oxley, 3 T. Rep. 653, which perhaps proceeded on some technical rule of English pleading. (*i*) 2 Pardessus, No. 253, 1 Stair, 3. 9, and Farries v. Stein, as cited above, p. 37.

(*k*) 2 Pardessus, No. 253.

In Great Britain, by statutes of universal application, writing is required in proof of sale in the following cases:—

In the transference of ships, by the navigation laws, a written instrument of vendition is necessary, together with an entry in the register of the vessel kept by the collector and controller of customs at the ship's port, and an entry also on the certificate of registry in the hands of the master of the ship.(*l*)

In the special case of goods warehoused for the duties in the warehouse of the importer, they can be sold in the warehouse only by a written title of
[*40] *transference entered in a book kept by the officer who has charge of the warehouse, on the part of the Crown.(*m*)

In the sale of literary property or copyright, writing is declared to be necessary.(*n*)

In the sale or assignation of patent rights, although writing is not required by the statute, it seems to be held necessary on the analogy of the copyright act.(*o*)

In France also, writing is required as the legitimate proof of the sale of ships, and of patents for inventions, as well as where the parties have expressed their intention of completing the contract in writing; and the consent of the parties must be entered in the public register.(*p*)

In Holland ships are transferred in like manner, only by a written title recorded in a special register provided for the purpose.(*q*)

In America, the law requires writing in the sale of ships, together with a registry in the custom-house books and certificate, all nearly analogous to the English law.(*r*) It is also by that law required, that the assignment of copyright shall be by an instrument in writing,(*s*) and patents of invention are assignable by writing, to be recorded in the patent office.(*t*)

(2.) Of sales where writing is *not indispensable*.

[*41] *The general principle of the Roman law, giving admission to all kinds of evidence, parole as well as written, in proof of the commercial contract of sale, has been followed as to the sale of goods and merchandise in Scotland, France, and Holland; but peculiar rules have been established in England and America.

It would appear that at one time, in both these countries, the rules of evidence in this matter had been very much upon the same footing as in those nations who had followed the Roman law; but, in the seventeenth century, there arose in England so great a dread of frauds and perjuries that a statute was passed, called the statute of frauds, by which this matter was placed on a new footing.(*u*)

The application of this statute was further enlarged, by an act in the reign of Geo. IV.,(*v*) and the rules established by these statutes have been very closely followed in America.

(*l*) 3d and 4th Will. IV., c. 55.
(*m*) 3d and 4th Will. IV., cap. 57, sec. 9. (*n*) 5th and 6th Vic. c. 45.
(*o*) See Chanter v. Leese, 4 Meeson and Welsby, 295.
(*p*) Code de Commerce, Art. 195, Lois. Fran. Loi 14, Mai, 1791, Tit. 2, Art. 15. See 16 Duvergier, p. 198.
(*q*) Code de Com. de Hollande, Art. 309.
(*r*) 3 Kent, Com., 139, *et seq.* (*s*) 2 Kent, Com., 383. (*t*) 2 Kent, Com. 367.
(*u*) 29th Chas. II., cap. 3, sec. 17. (*v*) 9th Geo. IV. c. 14.

## *Proof of Sale by the Law of England.*

*Proof by Writing.*—By the statute of frauds it is enacted, that "no contract for the sale of any goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized." *The rules of this act were extended to executory contracts by the act commonly called Lord Tenterden's Act.(*w*) [*42]

These statutes were not intended to confine the evidence of sale to written proof, but, in absence of such proof, to limit the admission of parole evidence to such cases as, commencing with some act of real evidence obvious to the senses, might be safely left to the parole proof of the special agreement.

In relation to the writing requisite to establish the contract of sale, two questions may be raised: 1st, What is the description of the writing necessary to bind the parties, supposing the terms to be therein distinctly stated? and, 2d, Whether, if the writing be defective in the statement of the terms, parole evidence be admissible to complete the proof?

(1st.) The writing enjoined by the statute is not intended to be a formal or solemn contract, such as a notary or lawyer would draw up; but in the true sense of the law, as well as by its words, such a note or memorandum only as may be made on the spot, in the hurry of business, as a jotting in a pocket-book, or an entry in a day-book or journal. But it must be signed, either by the parties to be charged upon the contract, or by one legally authorized by them. It has been laid down by Sir William Grant, relative to this matter of signing, in a case occurring under the 4th section of the statute,(*x*) that "it is not enough that the party may be identified. He is required to sign;" that, without the party having either put his name to it, or done some *other act intended by him to be equivalent to the actual signature of the name (such as a person unable to write making his mark, there is no signature within the meaning of the statute, "merely because you may identify the writer." "If so, the words I 'or me' would be enough, provided you could prove the hand-writing." [*43]

In a case where an order was taken by a rider for goods, and marked in the rider's book, but not signed by the person who gave the order, and was chargeable upon the contract, this was held no sufficient note or memorandum to bind him in terms of the statute, or suppliable by parole evidence of the note having been read to him at his own desire.(*y*)

It is, however, held to be a sufficient signing if the note contain the name of the party, written by himself, though not in the way of subscription, provided it be so inserted as to authenticate the agreement as his. Where, for example, a note was written, beginning, "I, James Crockford, agree," &c., though the note was unsigned, it was held sufficient, there being no intention of leaving the agreement imperfect as a mere proposal.(*z*) So, in another case,

(*w*) 9th Geo. IV., cap. 14.
(*x*) Selby v. Selby, 1817; 3 Merivale, 2.
(*y*) Cooper v. Smith, 1812; 15 East, 103.
(*z*) Knight v. Crockford, 1794; 1 Esp. 190.

a note written by the party himself, beginning, "Mr. Foljambe presents his compliments, &c., Sir William Grant said, the question is "Whether, taking the agreement to be sufficiently explicit in terms, it has the signature which is required by the statute. It is admitted that, provided the name be inserted in such a manner as to have the effect of authenticating the instrument, the pro-
[ *44 ] vision of the act is complied *with, and it does not much signify in what part of the instrument the name is to be found." "Here the name begins the note and governs all that follows. I am therefore of opinion that there is in this case an agreement reduced to a certainty, with such a signature as is required by the statute."(a)

But where the name, though written by the party to be charged, is not subscribed and not intended plainly to authenticate the instrument, and to be applicable to the whole, it is not sufficient to satisfy the statute,—it being held as the true meaning, that there shall be an acknowledgment by the party, under his own hand, that it is his agreement, and that if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. If inserted so as to have that effect, it does not signify in what part of the instrument it is to be found."(b)

It is sufficient that the name of the party shall be in the writing by his authority, though not written by himself, as where a printed invoice was sent of the goods bearing the name of the sender, and he afterwards wrote desiring to know where the goods invoiced should be sent. This letter was held to authenticate the invoice.(c) Again, where a bill of parcels was sent with goods, with the name of the seller printed, and that of the buyer, as debited with the goods, written by the seller, his so writing the buyer's name, and authorizing the bill of parcels to be sent, though his own name was
[ *45 ] *only printed, was held sufficient to authenticate this as a note or memorandum under that statute.(d)

But it was held by Lord Hardwicke, that sealing the note is not a sufficient signing, the statute requiring evidence from the handwriting: and he referred to the previous authority of Levinz as a great lawyer, "that where an act of Parliament mentions signing, it means something different from sealing."(e) In one case it was said, that where one has his name upon a stamp, that is enough; and in another case it has been held that signing by a mark was sufficient. Although there is as little proof of identity in using a stamp, or in signing by a mark, instead of the name of the party, as in the use of a seal, yet this has been held a sufficient signing.(f) There does not appear to be any direct decision on the effect of a subscription by initials, but this may be considered as one of the most distinctive *marks* that can be employed.

It is next to be observed, that it is not necessary that the note shall be signed by both parties; provided it is authenticated by him "who is to be charged therewith." This rule is sanctioned by the authority of some of the greatest names on the English bench, including Lord Thurlow, Lord

(a) Ogilvie v. Foljambe, 1817; 3 Merivale, 53.
(b) Stokes v. Moore, 1786; 1 Cox. 219.
(c) Saunderson v. Jackson, 1800; 2 Bos. and Pul. 238.
(d) Schneider v. Norris, 1814; 2 Maule and Sel. 286.
(e) Grayson v. Atkinson, 2 Vesey Sen. 459.
(f) Lemayne v. Stanley, 1 Philips on Evidence, 480.

Eldon, and Sir William Grant.(*g*) But it is necessary, notwithstanding, that both parties should be named in the note or memorandum; as, where a bargain was made with a clerk, who entered it in his *memorandum-book as an article bought, but without naming his master as the purchaser, and this memorandum was signed by the seller, it was held not to be within the act, as not stating the names of the contracting parties.(*h*) But the name of the party who does not sign may be supplied by collateral written proof, as by relative correspondence.(*i*) It seems even to be doubtful whether it would not be a sufficient proof to this effect, if an order for goods were written and signed by the buyer in the proper order-book of the seller.(*k*) [*46]

A letter by the party is a sufficient note or memorandum to satisfy the statute, if it clearly set forth or explain the nature of the agreement.

And it is sufficient that the essential terms of the bargain shall appear in other writings distinctly referred to, provided the connection is not made out by parole evidence merely, as where the terms of the bargain are to be collected from a series of correspondence. Thus, Lord Eldon says, "It has been long since settled, as the doctrine of the Court, that agreements, when clearly made out, will be established; and that, if a correspondence is of such a nature as, according to the rules of sound legal interpretation, would amount to an agreement, the agreement, so constituted, will be carried into effect in the same manner as if it had been regularly drawn up in the form of articles of agreement, and signed by the parties as such." He adds, "The same construction *must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument, the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in ariving at a precise conclusion."(*m*) [*47]

It is by the statute required, that the note or memorandum shall be signed either by the parties themselves, or by "their agents thereunto lawfully authorized." In the construction of these words, it has not been held necessary that such authority shall be in writing. Lord Chancellor Eldon said, "it is clearly settled now, that an agent need not be authorized in writing."(*n*)

The agent must be a third party, neither of the principals being entitled to act as agent for the other. Lord Ellenborough, in a case in 1829, said, the agent must be some third person, and could not be the other contracting party; and he rejected parole proof brought to shew that, by overlooking and correcting the memorandum, the party to be charged had authorized the name of the other to be used as that of his agent.(*o*) The same principle was held by the Court of King's Bench, in another case.(*p*) And Lord Chief Justice Abbott delivered a similar judgment, where an *auctioneer, suing as one of the contracting parties, Wright's case, was held in point [*48]

(*g*) 1 Sugden on Venders and Purchasers, 160, and cases there cited.
(*h*) Champion v. Plummer, 1803; 1 New Rep. 252.
(*i*) Allen v. Bennet, 1810; 3 Taunt. 169. (*k*) See 3 Taunt. 175.
(*m*) Kennedy v. Lee, 1817; 3 Meriv. 450. See also Richards v. Porter, 1827; 6 Barn. and Cress. 437; and Smith v. Surman, 1829; 9 Barn. and Cress. 561.
(*n*) See Coles v. Trecothick, 1804; 9 Vesey, 250. Emerson v. Heelis, 1809; 2 Taunt. 38. (*o*) Wright v. Dannah, 1809; 2 Camp. 203.
(*p*) Cooper v. Smith, 1812; 15 East, 103.

to rule, that "the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party on the record."(a)

A broker may be the agent for both the parties, and his bought-and-sold notes exchanged between them will bind the bargain. See below, p. 73.

An auctioneer is also entitled to act for both parties; and, though once doubted, it is now quite settled that he is so far agent for both, that his memorandum of the biddings binds the contract. In a leading case in King's Bench, in the time of Lord Mansfield, it was decided, that the auctioneer is to be considered as agent for the buyer, after knocking down the hammer, as well as for the seller; and that his setting down in writing the name of the buyer, price, &c. was sufficient to take the case out of the statute.(b) It was held in more recent cases, both in King's Bench and Common Pleas, that the rule was to be considered as settled.(c) In another case, the clerk of the auctioneer having put down the name of the buyer on his nodding assent to the goods being declared his, the authority was held sufficient.(d) But if the name be written by the auctioneer only in a catalogue containing
[ *49 ] the conditions *of the sale, this is not a sufficient memorandum, in the sense of the act.(e)

Although the authenticity of the written note or memorandum, as signed by the party, or by one authorized by him, is sufficient to satisfy the act; yet the fact of its being so signed is not proved by the mere signature, but must, if denied, be established to the jury by the testimony of one who saw the note signed, or who knows the handwriting to be that of the party, by having seen him sign his name.

So Lord Chief Justice Abbott held it enough that the witness had seen the party sign his surname, and swore to his belief that the surname on the writing was the defendant's.(g) And he denied a previous case,(h) where Lord Ellenborough, at Nisi Prius, had deemed such evidence insufficient.

When the witness has seen the person subscribe only once, his testimony, especially if accompanied with any degree of uncertainty, has been admitted to go to the jury, though not perfect evidence.(i)

Where the knowledge of the authenticity of the signature is derived from correspondence, it is necessary that proof should be given of the writing in such correspondence having been by the hand of the party whose signature is in question. The witness must either have seen the correspondence
[ *50 ] written by the person, or at *least must be able to prove that it came directly from him.(k)

Proof of authenticity of the signature by comparison of the handwriting, whether by persons skilled in that matter, or by the jury themselves, is rejected as mere opinion not evidence.(l)

(a) Farebrother v. Simmons, 1822; 5 Barn. and Ald. 333.
(b) Simon v. Motivos, 1766, 3 Burr. 1921; 1 Blackst. Rep. 599.
(c) Hinde v. Whitehouse, 1806; 7 East, 558. Phillimore v. Barry, 1808; 1 Camp. 513; 1 Bell's Illus. p. 87. Emmerson v. Heelis, 1809. 2 Taunt. 38.
(d) Bird v. Boulter, 1833; 4 Barn. and Adol. 443.
(e) Kenworthy v. Schofield, 1824; 2 Barn. and Cress. 945. See also Hinde v. Whitehouse, 1806; 7 East, 558. (g) Lewis v. Sapio, 1827; 1 Moodie and Malk. 39.
(h) Powel v. Ford, 1817; 1 Starkie, 124.
(i) Garrles v. Alexander, 4 Esp. 37. Burr v. Harper, 1816; Holt, N. P. 420.
(k) Harrington v. Fry, 1824; Ryan and Moody, 90.
(l) Brookbard v. Woodby, 1770; Peake, N. P. 20, note b. Macpherson v. Thoytes; N.

Although the mark of the party has been received as a subscription under the statute,(*m*) it is only where the party cannot write, and the witness has seen the mark affixed by him, or the mark has been admitted to be genuine. And although Tindal, Chief Justice, allowed the testimony of a witness to go to the jury, he not having seen the mark affixed, but having frequently seen the party make his mark, and pointing out some peculiarities as indicating identity, it was with hesitation that he did so.(*n*)

(2d.) It has been settled that, if the note or memorandum do not contain all the particulars of the contract, it cannot be taken to give a commencement to parole evidence (as proving that a bargain of sale has been entered into), so as to entitle the parties, by parole proof, to establish the particulars of the contract. *According to the true policy of the statute, the note or memorandum must either be in itself complete, or at least the essential terms of the contract must be made out by direct reference, or connection in writing, with something else, or by implied reference to the usage or custom of trade, or rate of the market, or reasonable price. The Court of King's Bench, in a case where an essential alteration had been made on the original sale note, without the consent of the purchaser, refused to allow parole evidence; and Mr. Justice Bayley said, that, "without a written contract, the case would be within the statute of frauds; and the mischief would be the same if parole evidence were let in, to show how much of the contract was good, and how much was bad."(*o*) [*51]

As the price is an essential part of the contract, so, where a special price has been fixed by the parties, it must be specified in the note, and cannot be supplied by parole proof.(*p*) But if no special price has been fixed, and the note says nothing of the price, the market price will be implied, if the commodity be marketable; or the reasonable worth will be taken, if fairly applicable to the case.(*q*)

All the other essential parts of the contract must be stated in the memorandum, and cannot be supplied by parole evidence.(*r*)

The importance of this doctrine is confirmed by the *contrast between cases under the 17th section of the statute, and engagements under the 4th section, as to which last, the statement of the consideration for the engagement has been strictly required.(*s*) [*52]

The same necessity which, under the statute, has been thought indispensable in respect to the essential conditions of the contract, is not insisted upon in proof of the authority under which an agent signs for the party. This, as already observed, may be proved by parol evidence.(*t*)

P. 20. Stranger v. Searle, 1793; 1 Esp. 14. Goodtitle v. Braham, 1792; 4 Term Rep. 497; Peake, Addl. Cases, 131. Carey v. Pitt, 1797; Peake, Addl. Cases, 130. Gurney v. Langlands, 1822; 5 Barn. and Ald. 330. In which last case Abbott, Chief Justice, Bayley, Holroyd, and Best, Justices, rejecting the evidence of the inspector of franks at the post-office, held that such evidence, if in any case to be admitted, is of little or no weight.

(*m*) See Lemayne v. Stanley, 1 Phillips on Evidence, 480.

(*n*) George v. Surrey, 1830; 1 Mood. and Malk. 516.

(*o*) Powel v. Divot, 1812; 15 East, 29.

(*p*) Elmore v. Kingscote, 1826; 5 Barn. and Cress. 583. Acebal v. Levy, 10 Bing. 384.

(*q*) 2 Blacks. 30. See also Hoadly v. M'Laine, 1834; 10 Bing. 482; 1 Bell's Illus. p. 95.

(*r*) See Brodie v. St. Paul, 1791; 1 Ves. Jr. 326.

(*s*) See the cases Wain v. Warlters, 1804; 5 East, 10. Phillips v. Bateman, 1812; 16 East, 356. Saunders v. Wakefield, 1821; 4 Barn. and Ald. 595. Egerton v. Mathews, 1805; 6 East, 307.

(*t*) Wilson v. Hart, 1817; 7 Taunt. 295.

The summary, then, of the English law as to written proof of sale, is this:

1st, That there must be a note or memorandum in writing, either signed by the party to be charged on the bargain, or by one authorized by him; or,

2d, That at least the writing must be such as to prove the assent of the party to the terms of the agreement, and the employment of his name as so assenting.

3d, That the authenticity of the signature, or what is to stand as such, must be admitted, or proved by one who has seen it written, or who knows the handwriting by having seen the party write his name, or who has corresponded with him in an interchange of letters known to be written by him.

4th, That a broker employed by the parties may bind them by the bought-and-sold notes, the evidence of such employment, or of the authority to sign for the party, being either in writing or by parole.

[*53] *5th, That the writing must contain all the essential parts of the agreement, the thing sold, and the price to be paid, or must refer specially, or by necessary implication, to the market or reasonable price of the commodity.

6th, That letters of correspondence, or other writings, out of which the assent of the parties to the essential terms of the bargain can be collected, will satisfy the statute.

*Parole Proof.*—The original statute of frauds admits parole proof of sale in the following cases of bargains to the amount of £10 or upwards, as exceptions to the general rule by which a written note or memorandum is required, viz., where "the buyer shall accept part of the goods sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment." And the more recent act relative to executory sales, extends the same rule to "all contracts for the sale of goods of the value of £10 and upwards, notwithstanding the goods may be intended to be delivered at some future period, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."(*u*)

The construction of these acts seems to admit of no doubt; and in several cases, both in the King's Bench and Common Pleas, it has been held that a verbal contract, without earnest or part payment, or delivery and acceptance in whole or in part, is not binding on the parties. Lord Loughborough, in

[*54] 1792, laid down: That *though an agreement (to furnish 3000 sacks of flour at 41s. per sack) was confessed, the buyer was not bound; it being one great object of the statute to lay down a clear and positive rule to determine when the contract should be complete, and that there being neither earnest, nor part of the goods received, nor a note in writing signed by the parties, there was no binding contract.(*v*)

The first doubt on the construction of the act, relates to the amount of the price, whether above £10? It was held, first, that when one goes into a

(*u*) 9th George IV. chap. 14, § 7.

(*v*) Rondeau v. Wyatt, 1792; 2 Hy. Blacks. 63; Confirmed in Cooper v. Elston, 1796; 7 Term Rep. 14. Garbutt v. Watson, 1822; 5 Barn. and Ald. 613. See also Wilks v. Atkinson; 6 Taunt. 11.

shop and purchases a number of articles, each below the value of £10, but the amount of the whole is above that value, it is one entire contract, and parole evidence is excluded.(*w*) But, secondly, it was held in another case of sale by auction, that the purchase of several lots, each set up by itself, and the purchase concluded by an entry in the auctioneer's book, there was not one but several contracts, and the value of each purchase being under £10, parole evidence was admissible.(*x*)

Earnest given by the buyer to bind the bargain is, when proved by parole evidence, sufficient, and the property is passed. It is not much used in modern practice—does not require to be in money—but the token must be passed between the parties,(*y*) it having been held insufficient to draw a shilling across the hand *of the seller according to the custom of the north of England.(*z*) [*55]

By the statute, payment of part of the price will give admission to parole evidence.

The most difficult set of questions has arisen upon that part of the statute by which the bargain is held complete if "the buyer should accept part of the goods sold and actually receive the same." So many nice distinctions and subtleties have been admitted in the construction of this part of the statute, that, to any one not familiar with the peculiarities of English pleading, the doctrine is difficult to be reconciled with the simplicity requisite in practice. Two distinct acts are included; 1st, An act implying delivery on the part of the seller; and, 2dly, An act on the part of the buyer implying his acceptance of the goods as his own.(*a*)

Acceptance of a part of the goods, however small, is sufficient to bind the bargain, provided it is given and received as part of the goods purchased. But it is not sufficient that a sample has been taken from the bulk and placed as such in the hands of the buyer, unless it is given or taken by the buyer out of the bulk after the bargain, as part of the goods for his own use. The proper use of a sample being to guide the buyer's judgment previous to a purchase, and not the indication of a completed transference.(*b*)

Analogous to a sample of goods is the trial of a horse, *and the criterion is, whether the riding of the horse is a mere trial, or the exercise of an act of ownership. And in a case where it was proposed to purchase a horse, and the buyer and his servant ordered the horse out of the stable, galloped, cleaned, and ordered a new roller and strap to be put on, it was left to the jury whether the sale was complete by the directions being given as *owner* of the horse. They held that it was so; but a new trial was granted, on the ground that the sale was not complete.(*c*) [*56]

The leading principle adopted in construing what shall be held the delivery and acceptance of a part, has, after much discussion and many doubts, been settled to be this,—that it is necessary that there shall be such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, and on the part of the seller such an

(*w*) Baldey v. Parker, 1823; 2 Barn. and Cress. 37.
(*x*) Emerson v. Heelis, 1809; 2 Taunt. 38. Confirmed in Roots v. Lord Dormer, 1832; 4 Barn. and Ad. 77.
(*y*) 2 Black. 447.
(*z*) Blenkinsop v. Clayton, 1817; 7 Taunt. 597. Bach v. Owens, 1793; 5 Term Reports, 409.
(*a*) Philips v. Bistolli; 2 Barn. and Cress. 511.
(*b*) Hinde v. Whitehouse, 1806; 7 East, 558; 1 Bell's Illus. p. 87. Talver v. West, 1816; Holt's Cases, 178. Cooper v. Elston; 7 T. Rep. 14.
(*c*) Tempest v. Fitzgerald, 1820; 3 Barn. & Ald. 680.

act as will put an end to his lien on the goods for the price.(*d*) Thus Lord Chief-Justice Eyre held that the delivery of an order on the holder of a quantity of rice purchased verbally was sufficient to bind the seller.(*e*)

In another case it was held that an act tantamount to delivery, as the giving of the key of the warehouse in which the goods are lodged, or the disposal of a part of the goods by the buyer to a third party, is sufficient to satisfy the statute.(*f*) Again, it was held in respect to a sale of wine, that the cutting off of the spills, and marking the initials of the buyer on the *cask by
[ *57 ] the seller's clerk, was a sufficient delivery and acceptance under the statute, though not perhaps perfect to other purposes.(*g*)

But the mere operation of weighing out, or measuring, and laying aside, a commodity, does not seem to be sufficient acceptance and delivery according to the statute.(*h*) When, however, the article has been placed or left in possession of the seller, on a contract distinct from that of sale, this has been held sufficient: as where two horses having been purchased by verbal agreement, the buyer desired the seller to place them in his livery stable instead of the sale stable: this was held a sufficient delivery.(*i*) And in all the subsequent cases, this case has been held a leading precedent, and the change of the contract from sale to that of custody, has been held the criterion of a delivery and acceptance in terms of the statute.

The difficulties which arose in those cases, seem to have been accumulated in another,(*k*) where a race-horse having been purchased, the operation of firing was done under the inspection of the buyer, the seller agreeing to keep the horse for twenty days without charge, and the horse, on expiration of that time, was, by the buyer's direction, entered at grass in the name of the seller, no time being given for payment of the price. The Court held, that the horse having been entered in *the name of the seller, and no
[ *58 ] time given for payment of the price, there was no delivery in terms of the statute.

In the case of a foreigner bidding at auction for an article of jewellery, on condition that a part of the price was to be paid on being declared bidder, and the residue on delivery, it was held that the handing of the article to the foreigner, who objected that he had been mistaken as to the price he had bid, was not a delivery and acceptance in terms of the act.(*l*)

In one case of an executory contract, a person employed another to make for him a wagon, and furnished to him iron and a tilt with which to complete the work. The wagon was finished, and the workman brought his action for the price, but he was nonsuited on the ground that there was here no acceptance under the statute, which there would have been if, after the work was finished, the person who ordered the wagon had sent a workman of his own to perform any additional work on it; and that where any doubt remains, it is safe to adhere to the plain words of the statute, which point as clearly as

(*d*) Smith v. Surman, 1829; 9 Barn. & Cress. 561. Hanson v. Armitage, 1822; 5 Barn. and Ald. 557.
(*e*) Searles v. Keeves, 1798; 2 Esp. 398.
(*f*) Chaplain v. Rogers, 1800; 1 East, 192.
(*g*) Anderson v. Scott, 1806; 1 Camp. 235; 1 Bell's Illus. p. 88. See also Hodgson v. Le Bret, 1808; 1 Camp. 233.
(*h*) Howe v. Palmer, 1820; 3 Barn. and Ald. 321.
(*i*) Elmore v. Stone, 1809; 1 Taunt. 458. See Smith v. Surman, 1829; 9 Barn. & Cress. 561.
(*k*) Carter v. Toussaint, 1822; 5 Barn. and Ald. 855.
(*l*) Philips v. Bistolli, 1824; 2 Barn. and Cress. 511.

words can do to an actual delivery and an actual receiving of the whole or part of the goods sold.(*m*)

In reviewing the cases on the construction of this statute, it is to be lamented that there is a want of the simplicity in the rules according to which the binding force of a bargain is to be determined, which is so desirable in a matter of daily occurrence. This seems to proceed from two causes,—from the strictness of English *pleading, and the rigid adherence to certain requisites as essential to the nature and success of particular actions; [ *59 ] and from allowing the doctrines relating to the direct transference to be confounded with those which properly belong to a question of evidence relative to the contract between the parties. In those systems of jurisprudence in which the doctrines of transference of property, and those of contract and engagement, are kept distinct, these perplexities and subtleties are avoided. And it does not seem obvious, on perusing the statute of frauds, that there was any other intention on the part of the Legislature than to exclude parole evidence in those cases in which there was no overt act proving that the parties had seriously engaged to complete the transference.

### *Proof of Sale by the Law of America.*

The law of the United States of America in this matter is grounded on the law of England, and has indeed been settled nearly on the footing of the English statute of frauds, as applicable to all contracts for the sale of goods or chattels for the price of 50 dollars or more. What has already been said, therefore, on the statute of frauds, may be applied generally, but with certain exceptions, to the American law; and accordingly the venerable Chancellor of the United States has, in his excellent Commentaries, referred to the English cases as precedents and authorities on these points.(*n*)

The statute of frauds, as thus adopted in America, *has a few years ago been reconstructed by the Legislature of New York, and [ *60 ] the rules as so fixed, are proclaimed in the Revised Statutes.(*o*)

Under the law, as it formerly stood, it was held—

1st, That a mere contract to sell, without delivery, actual or symbolical, did not pass the property.

2d, That the rule requiring either writing, or alternatively part payment of the price, or a delivery and acceptance of the whole, or of part, of the goods, extended to executory sales, as well as to others, the Court declaring in one case,(*p*) that the American Statute of Frauds, in the 15th section (corresponding with the 17th section of the English) extended to executory contracts as to others, and that the decisions of the English Courts, in Rondeau v. Wyatt,(*q*) and Cooper v. Elston,(*q*) contained the sound and just construction of the statute. But,

3d, That it did not extend to a contract for goods to be manufactured, only to goods in solido, as wheat unthrashed.(*r*)

4th, That delivery of the documentary evidence of title (as the receipt of

(*m*) Maberly v. Shepherd, 1835; 10 Bing. 99. (*n*) 2 Kent, Com., 493 and seq.
(*o*) Revised Statutes of the State of New York, vol. 2, chap. 7; vol. 3, p. 657.
(*p*) Burnet v. Hall, 1813; 10 Hen. Johns. Rep. 372, confirmed in Newman v. Morris, 4 Har. and M. 421. (*q*) See above, p. 54.
(*r*) Sewell v. Fitch, 1828; 8 Cowen's Rep. 215.

a store-keeper for the goods) was sufficient to satisfy the statute and change [*61] the property,(s) and even pointing out of ponderous goods (as logs *in a boom) was delivery sufficient to change the property.(t)

5th, That it was sufficient acceptance under the statute, to receive a bill of parcels and an order on the warehouseman for the goods, and pay the price.(u)

6th, That, as part performance, it was sufficient generally to take the case out of the statute, that the act was such as would not have been done but on account of the agreement; and that being done, with a view to performance, it was prejudicial to the person so acting,(v) or such as usually or necessarily follows such an agreement,(w)—the difficulties which had been found to attend the very rigid construction of the English law having led the American Judges so far to relax the rule as to admit symbolical delivery as sufficient.

The law of America, standing thus on the same footing as that of England, under the statute of frauds, the precise words of which had been adopted in the American statute, the following alterations were made in the Revised Statutes of New York in 1836.

1st, That instead of 25 dollars as the amount of the price requiring the contract to be subject to the rule of the statute, it should apply only to contracts to the value of 50 dollars.

2d, That, as to "the buyer accepting and actually receiving a part of the goods," the difficulties which had arisen in America, as well as in England, [*62] from the *restrictive word "actually," even in cases where, from necessity or the convenience of trade, the parties were obliged to satisfy themselves with a virtual or symbolical, or constructive delivery, and which had induced the American courts in some cases to hold symbolical delivery enough, it was thought expedient to remove those difficulties by striking out the word "actually."(x)

3d, Another modification of the former law was suggested and adopted as to requiring payment of part of the price. The words "at the time" were introduced, so as to require the bargain to be bound at the time of making it, by such payment.

The Revised American Statute of Frauds, as applicable to sale, stands thus:—

"That every contract for the sale of any goods, chattels, or things in action for the price of 50 dollars or more, shall be void, unless, (1.) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or, (2.) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, (3.) unless the buyer shall at the time pay some part of the purchase-money."(y)

It is further provided, with a view to the protection of creditors against devices by which they are frequently defrauded, and, in order to correct too

(s) Wilks v. Ferris; 5 Johns. 385. Hollingworth v. Napier; 3 Caines's Rep. 182.
(t) Jewit v. Warren, 12 Mason's Rep. 300.
(u) Pleasants v. Randolph, 6 Rand. 473.
(v) Davenport v. Mason, 15 Mason's Rep. 85.
(w) Townshend v. Sharp, 2 Dig. 306; Vincent v. Gourmand, 1814, 11 Johns. 283.
(x) Reviser's Report and Notes, Rev. Stats. of New York, vol. 3, p. 657.
(y) Rev. Stats. of New York, c. 7, tit. 2, § 3.

rigid a rule, holding every sale and mortgage of moveables, without immediate possession, as void: "That every sale made by a vendor of goods or chattels in his possession or *under his control, and every assignment [*63] of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be *presumed* to be fraudulent and void, as against the creditors of the vender or the creditors of the person making such assignment or subsequent purchasers in good faith; and shall be *conclusive evidence* of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."(z)

### *Proof of Sale by the Law of Scotland.*

The proof of the contract of sale of goods and merchandise by the law of Scotland is not confined to written evidence, except in the few cases already stated, where it is specially required by statute. All the evidence which is admissible to prove facts is competent to establish this contract; solemn written contracts, notes, or memorandums, signed by the parties, correspondence, invoices, and bills of parcels, or parole evidence, without either earnest or part payment of the price, or part delivery of the goods, may all of them be resorted to in support of an action on the contract of sale.

In those cases in which writing is made necessary, or *when the [*64] parties choose that mode of proof, it may either be by a formal contract, signed before witnesses, and bearing the name and designation of the writer and witnesses, or by writings holograph of the parties, and signed by them, or by a note or memorandum in writing, not holograph but signed.(a) The law was more strict formerly, it having been held, in the earlier cases, that a writing bearing the terms of the contract should be holograph of the obligor, and that the authenticity of the subscription, when the writing was not holograph, should be proved by the person founding on it. But this was afterwards deemed inconsistent with the facilities required in commercial dealings; and it is now held that a writing or memorandum, though neither witnessed nor holograph, if signed by the parties, is probative and sufficient to maintain an action, unless the defender shall prove it to be false.(b)

Parole evidence, where the parties rely upon that sort of proof, requires the testimony of two witnesses, or of one witness with circumstantial evidence. But where the parties have agreed to reduce their contract to writing, parole evidence is not admitted to alter the terms, or even to complete what may have been omitted, and is essential to the contract.

There is a limitation, however, of parole evidence as applicable to sale,

(z) 2 Revised Statutes, c. 7, tit. 2, § 5, and Reviser's Notes, vol. 3, p. 657.
(a) 3 Ersk. 2, 24.
(b) Paterson v. Wright, Jan. 31, 1810; Fac. Coll.; affirmed 4th July 1814; 1 Bell's Illus. p. 176. See Ramsay v. Pyronon, July 12, 1632; Mor. 16,963; 3 Bell's Illus. p. 72. Forrest v. Veitch, July 19, 1676; Mor. 16,970; 3 Bell's Illus. p. 72. M'Lurg v. E. of Dalhousie, Jan. 2, 1678; Mor. 16,970. Goodlet Campbell v. Lennox, Dec. 18, 1793; Mor. 16,979; 3 Bell's Illus. p. 72.

[ *65 ] namely, that after five years the *bargain cannot be proved, otherwise than by the writing or admission on reference to oath of the person to be charged.(c) But this limitation has been held not to apply to a consignment of goods on an advance made by the consignee.(d)

Thus the distressing subtleties and nice distinctions which have occasioned so much litigation in England relative to the part-delivery of goods as binding the bargain, and which in America are now avoided by the change upon the Revised Statutes of New York, have no place in the law of Scotland. And it does not appear that any of the evils or inconveniences which compelled the English Legislature to pass the Statute of Frauds have attended the more relaxed rule established in Scotland. And, indeed, it well may be doubted whether the requisite of a note or memorandum in writing, signed by the party, may not in this age of frequent and successful forgeries, produce more numerous frauds than the course which has been adopted in the law of Scotland.

### *Proof of Sale by the Law of France.*

By the ordinance of Moulins in 1566, proof by witnesses was greatly limited in cases not commercial. Contracts for a value above 100 livres were required to be completed before notaries and witnesses, or constituted by pri-
[ *66 ] vate writing, verified after a certain prescribed *mode. But an exception was, in practice, made of mercantile dealings on account of the necessary rapidity of such transactions, and of the difficulty of having written evidence of such dealings made out in the market place. Parole evidence in such cases was first admitted in the mercantile tribunals by "les Juges et Conseils des Marchands," and they continued, notwithstanding the above ordinance, to admit parole evidence in mercantile cases by a discretionary administration of the law, wherever the good credit and character of the dealer, or the attending circumstances, seemed to render that a safe course to be followed.

When this matter came to be settled in later times, the framers of the Code Civile, in laying down the rule of written evidence in ordinary agreements, added, "Without prejudice to what is prescribed in the laws relative to commerce." And in settling for the Code de Commerce what should thus be prescribed, after much discussion it was resolved, so far to yield to the favour of trade, and the impossibility or difficulty of preparing written evidence amidst the hurry of many commercial dealings, as to leave the power of admitting parole evidence in the discretion of the mercantile courts. At first it was proposed to admit parole testimony only when "commenced in written proof." But this, in detail, was found to be very inexpedient and inconvenient; as most of the dealings in the provinces were by illiterate persons who could not write, nor keep books, such as farmers, carriers, and countrymen who transact their business in fairs; and the checks and guards on dishonesty make parole evidence on the whole not dangerous in such cases, as disputes seldom occur, except on occasions of extraordinary rise or fall of

(c) Stat. 1669, c. 9; 3 Ersk. 7, 20. White v. Spence, Jan. 1683; Mor. 11,065; 1 Bell's Illus. p. 349. Ewart v. Murray, June 1730; Mor. 11,067; 1 Bell's Illus. p. 349. Nobles v. Armstrong, June 11, 1813; Fac. Coll.; 1 Bell's Illus. p. 349.

(d) M'Farlane v. Brown, Jan. 17, 1827; 5 S. 205; 1 Bell's Illus. p. 349.

prices, and *then witnesses are always found sufficient to prevent injustice. On these considerations it was settled that "the contract of sale may be constituted by parole proof, wherever the tribunal should think it ought to be admitted."(e) This is held to imply, 1st, That the mercantile tribunals are entitled, according to mercantile practice, to sustain parole proof without requiring a commencement in writing; 2d, That the spirit of the law requires them to be very circumspect in receiving such proof; but, 3d, That in admitting it rashly, and without proper checks, they are guilty of no violation of the law, however exceptionable their judgment may be in the particular case, or in the conclusion at which the Judges have arrived.(f) [*67]

In the administration of the law thus modified, it is of course held to be the duty of the Judge, where the proofs are not in all respects clear of doubt, to take care, by means of concurring testimony, or of accompanying circumstances, to search out the truth; and in this respect the French law does not seem to differ much from that of Scotland.

Formal contracts, by "actes authentiques," or "actes sous signe privé," subscribed by the parties; or simple letters duly exchanged; or correspondence; although one or the other of the necessary proofs of the agreement may be in the power of one of the parties,(g) are all admissible as good evidence of sale.

Referring to the code, and to the commentaries of Toullier and Pardessus(h) for the requisites of the *"actes authentiques," it is sufficient here to say, that they derive their authority as genuine from the mutual assent or subscription of the parties before official persons or notaries. Where this formal act is used, it must be agreeably to the rules laid down in the common law, and must forego all the privileges of a mercantile writing; but it is, of itself, proof of the contract and of its terms against the parties, requiring only, when founded on beyond the territory where made, the character and signature of the officer to be established by a judicial attestation.(i) Against third parties, however, it is proof only of the fact of the act itself.(k) [*68]

"Actes sous signe privé" are proper contracts, formally extended and subscribed by the parties. The rule is, "that no writing is of itself proof,"—("aucune écriture ne fait foi par elle-même,") and it admits of exception only in favour of "actes authentiques."(l) But writings under private signature, though not of themselves probative, are, at least, to a certain extent worthy of credit, being made the ground-work of a judicial demand, under the penalty, if insisted in, of the person being held to use a forged writing.(m) The person whose name it bears, and who is called upon as bound by it, may be required to confess or deny his signature, to the effect, on his acknowledging its authenticity, or keeping silence, of being held bound; and, in case of denial of the signature, all sorts of evidence, parole, or *comparison with recorded signatures in "actes authentiques," by skilful examiners of manuscript,(n) may be admitted to establish the contract. [*69]

(e) Code de Commerce, Art. 109. (f) 9 Toullier, 367.
(g) Toullier, vol. viii. No. 325; Duvergier, vol. xvi. p. 204.
(h) Toullier, vol. viii. p. 102—274; 2 Pardessus, No. 242.
(i) Pothier, Traité des Obligations, No. 734. (k) Ibid. No. 735-8.
(l) Pothier, des Obligations, No. 742; Toullier, vol. viii. p. 291.
(m) Code Penal, Art. 150—51.
(n) Code de Procedure, Art. 195. "Si le defendeur denie la signature à lui attribué," —"la verification en pourra être ordonné tant par titres que par experts, et par temoins." —8 Toullier, 313.

Formal contracts, then, under private subscription, are evidence only when fortified by admission, or by proof of the genuineness of the subscription. In effecting this, witnesses are admissible, if they were present when the writing was subscribed;(o) if not, but know the party's subscription, as having seen him write and sign his name. This is less to be relied on, and seems to require the aid of comparison by skilful persons of the writing, with others admitted or proved to be genuine.(p) Failing such proof, testimony seems admissible to facts which necessarily imply the existence and subscription of the writing, and its terms.(q) So that the result is, that "actes sous signe privé," *i. e.* contracts formal and subscribed privately, commence by written proof what may be completed by witnesses in verification.(r)

"Comparatio literarum," seems in France not to be admitted as evidence, except as an inference or argument or presumption of fact only: thus according so far with the opinion of the English Judges, that it is not evidence, but opinion,—a mere auxiliary to the Judge in *the search of truth, and [*70] the admission of which is left very much to discretion.(s)

To the general rule, that an "acte sous signe privé" is effectual, two exceptions have been stated:

1. Bills and notes must have the sum recognised by the obligant; either the whole bill, or at least the sum, must be written by him,(a) except bills by merchants, artisans, and journeymen. And,

2. In mutual contracts there must be a duplicate for each party, otherwise they shall not be probative ("valable,") *i. e.* shall not of themselves bear full faith.(t) To this, however, there is an exception in commercial dealings. See below, p. 71.

Besides those more formal and solemn kinds of written proof, which, of course, may occasionally be used in commercial dealings, there are several other kinds of writing admissible in evidence. Thus,

1. An offer and acceptance in writing will afford good proof of a contract, even in matters not mercantile, although it may be in the power of one of the parties to destroy either of these writings. In this the commercial law differs from the common. If the latter be held to require duplicates and fortification by other proofs, in the former, the writings themselves are proof, and duplicates are not required.(u)

2. Missives are good evidence to any extent, and are *indeed the [*71] ordinary mode of concluding dealings between merchants at a distance from each other.

3. Accounts of sale and invoices, and bills of lading, sent to correspondents, and bought and sold notes passed between the parties by brokers, are legitimate proofs in mercantile law.(v)

Invoices and accounts of sale require acceptance to bind the person to whom they are sent. But such acceptance may be proved otherwise than by writing,—as by witnesses or circumstances.(w)

(o) 8 Toullier, 315.
(p) 8 Toullier, 317.
(q) Code de Procedure, Art. 211. "Pourront être entendus comme temoins ceux,"—"qui auront connaissance de faits pouvant servir à decouvrir la verité."
(r) 8 Toullier, 325.
(s) 8 Toullier, 327. 343—362.
(a) Code Civ., Art. 1326. See 8 Toullier, 414, and seq.
(t) Art. 1325; 8 Toullier, 476, and seq.
(u) Code de Commerce, Art. 109. "Les achats et ventes se constatent par la correspondance." 2 Pardessus, No. 245.
(v) Code de Commerce, Art. 109.
(w) 2 Pardessus, No. 248.

4. Corresponding letters, sent with copies from the letter-book of the correspondent, or in some cases silence, is good evidence in sale.(x)

5. Merchants' books are admissible proofs, when kept with regularity, and fortified by the person's oath.(y)

### *Proof of Sale by the Law of Holland.*

By the law of Holland, the proof of that consent by which the sale is completed, may be by parole evidence of two witnesses, or of one witness fortified by corroborating circumstances.(z)

In the new commercial code of Holland,(a) no alteration appears to be made on the principles and rules of the former jurisprudence of that country.

### *Proof of Sale as settled by Brokers, Travelling Agents, or Mercantile Factors. [*72]

Brokers.—In the great commercial cities, sale is most commonly negotiated and settled by brokers, who make it their business to collect useful information as to prices and demand and supply in the market, and who act as neutral agents, closing the contract by bought and sold notes sent to either party.

These notes bear the essential terms of the bargain, the bought note being sent to the seller, the sold note to the buyer, and an entry being made in the broker's book in terms conformable.

It was at one time held in England, that the proper evidence of the contract was the entry in the broker's book, and that the notes sent to the parties were but transcripts;(b) but it is now settled, that, conformably to the statute of frauds, the note or memorandum to bind the person to be charged is the bought note sent to the seller, and the sold note sent to the buyer, each being bound by such note signed by the broker as his agent.(c)

It was also questioned whether, when a broker had settled a sale and sent the notes to the parties, he was to be held the agent of both or only of one. But *that point is now also settled, and a broker who settles the bargain is held as agent for both parties, with whichsoever of them his employment first begins.(d) [*73]

But although the bought and sold notes sent to the parties are the proper evidence of the contract, if it should happen that there were no bought and sold notes, the entry in the broker's book, signed by him, would be held as the contract.(e)

If the bought and sold notes sent to the parties differ in any material point, the contract is void, the parties not being at one as to the essentials; but a mere clerical error, or even a mistake in the name if productive of no loss, would not seem to invalidato the sale.(f)

(x) Code de Commerce, Art. 109. (y) Ibid. Art. 12.
(z) Van Leeuwen, Com. Roman-Dutch Law. (a) Code de Commerce Hollandois.
(b) Heyman v. Neale, 1809; 2 Camp. 337. Grant v. Fletcher, 1826; 5 Barn. and Cress. 436.
(c) Thornton v. Meux, 1827; 1 Mood. and Mal. 43. See Cumming v. Roebuck, 1816; Holt, 172. Goom v. Afialo, 1826; 6 Barn. and Cress. 117.
(d) Rucker v. Caimmeyer, 1794; 1 Espin. 105. Heyman v. Neale, 1809; 2 Camp. 337.
(e) Grant v. Fletcher, 1826; 5 Barn. and Cress. 436.
(f) Mitchell v. Lapage, 1816; Holt, 253; 1 Bell's Illus. p. 6.

Many of the difficulties which have arisen on these bought and sold notes depend on the peculiar rules of the statute of frauds in England; under which it is required that there shall be a written note of the contract signed by the party to be charged, or by one lawfully authorized to act for him. But it may be doubted whether in Scotland a bargain settled by a broker, entered in his book, and a note sent to each party, would not make an effectual sale though not signed by either the broker or the party.

Riders or Travelling Agents.—These persons are employed in the business of travelling round to the customers of dealers, with authority to receive payment of what may be due to their employers, and to take orders for the goods in which they deal. Those orders, *written in the [*74] book of the travelling agent and signed by the party to be charged will form a sufficient proof in England or America under the statute of frauds to bind the bargain, the agent being authorized to use the name of his employer as required by those acts.

If the bargain be for goods of a value under £10 in England, or 50 dollars in America, the bargain will be sufficiently proved by parole evidence. In France, Scotland, and Holland, the agent duly authorized may make bargains for his employer, provable by parole evidence, to any amount.

In all these countries it is held unnecessary to give evidence of the agent's authority in writing.

Mercantile Factors are, by the general authority vested in them by the possession of the goods of the principal, authorized to sell, or even to pledge, for money advanced. This has long been settled as the law of Scotland and of most of the other countries of Europe. It was held otherwise in England, till in consequence of an inquiry by a committee of the House of Commons into the laws of different commercial nations in this respect, it was settled by the 6th of George IV. c. 94, § 2. By sections 2 and 4, persons in possession as factors or agents of goods intrusted to them, or consigned, or in possession of the bill of lading, dock-warrant, warehouse-keeper's certificate, or other documents of property, shall be deemed the true owners, so far as to give validity to any contract by them made for the sale or disposition of the goods, or any part of them,(*g*) provided the buyer has not from the documents, *or otherwise, knowledge that the seller has no [*75] authority to dispose of the goods.(*h*)

### *Conclusion of the View of the Law of Evidence of Sale.*

The result as to the law of evidence of the contract of sale may thus be stated:—

1. In England, Scotland, France, Holland, and America, writing is indispensable in the sale of ships, of copyright, and of patents for invention, and it is necessary also in England and Scotland, where goods are to be transferred while in bond, if they are warehoused by the importer and seller.

2. In the cases where writing is not thus indispensable, or made indispensable by the agreement of the parties, it still is necessary by the law of England and America, in sales above the value of £10 in the one country, or

(*g*) Taylor v. Kymer, 1832; 3 Barn. and Ad. 320. Taylor v. Trueman, 1830; 1 Mood. and Mal. 457.

(*h*) See Evans v. Truman, 1831; 2 Barn. and Ad. 886; 1 M. and Rob. 10. See also Monk v. Whitenbury, 1831; 2 Barn. and Ad. 484; 1 Bell's Illus. p. 163 and p. 463.

50 dollars in the other, unless there be part delivery and acceptance, or part payment of the price, or earnest to bind the bargain.

3. In the cases of part delivery, part payment, or earnest, parole evidence is admitted in England and America, while in Scotland, France, and Holland, it is admitted in all cases where not expressly excluded by agreement of the parties.

4. Where written evidence is relied on by the parties, or required by the law, it is, in all the countries mentioned, requisite that it shall be signed by the party to be charged or by his agent, authorized either *in writing or otherwise; but in England, it is held sufficient that the name [*76] of the party, written by himself, or authenticated by him, shall appear in some part of the writing.

5. Where the subscription is denied, it must be proved in England, America, and France, by the person founding on it. In Scotland and Holland, the onus probandi is laid on the party denying the subscription.

6. Where the authenticity of the subscription is in question, proof by comparison of handwriting is rejected in England and America, but to a certain extent admitted in France, as an auxiliary proof of authenticity, and in Scotland as auxiliary in support of an objection to the writing.

7. Where writing is necessary or relied on by the parties, the instrument or note must contain all the essential parts of the agreement, parole evidence being incompetent to supply the want of any of them.

8. And, finally, it may be stated as a concluding proposition, that in all commercial nations the sale is received as effectually proved by such evidence as the law of the country where it is entered into holds to be sufficient.

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## *CHAPTER IV. [*77]

### THE MUTUAL OBLIGATIONS OF THE SELLER AND BUYER.

According to the principles of universal jurisprudence, as recognised in the Roman law, and substantially followed by all commercial nations, the reciprocal obligations of the parties in the contract of sale are—

1. On the part of the seller to deliver, as in the full right of ownership, the specific subject sold, or if the commodity be indefinite, an article which shall fairly answer the description, or if the sale be executory, the article to be provided or prepared according to agreement; to protect or indemnify the buyer against eviction or loss of the subject; and to insure to him those qualities, or that freedom from fault, which, either by express or implied warranty, he stands engaged to make good.

2. On the part of the buyer, to receive the thing so agreed on; and to pay the price in the way, and at the time, expressed or implied.

These are obligations which may be mutual, simultaneous, and concurrent; or they may be performable at different times. This will depend on the agreement of the parties, or the obvious nature and indication of the contract.

[*78] The party who demands or sues for performance *must, as part of his title, shew that he is ready and able to perform his stipulated part, or that it has already been performed.

If the contract be simple, without any stipulation as to time or place, or condition, the obligations are reciprocal, and the performance concomitant; —the seller may demand the price on shewing that he is ready to make delivery; and the buyer may demand delivery on shewing his readiness to pay the price.

If the sale be on credit, the buyer may demand delivery, provided no alteration have taken place in his credit.

If the price is to be paid down, and the commodity delivered at a distant place on a certain day, the buyer can demand delivery only on shewing that he has performed the condition precedent of payment.

There are (particularly in the law of England) certain technicalities of pleading which are too minute to be easily understood by those not familiar with that nice and intricate learning, but substantially the same rules which have now been stated, seem to prevail universally in all commercial nations, and are laid down by the institutional writers of all countries.(*a*)

It will be proper, then, to consider in their order,—1st, The obligations of the seller; 2dly, Those of the buyer.

## I. *Obligations of the Seller.*

[*79] The obligations of the seller are—1. To deliver the thing sold with the right of ownership; and, 2. To *warrant it to the buyer in respect of title and quality. These obligations are either express or implied.

1. *Delivery.*—The primary obligation of the seller is to deliver the thing sold, with such title and right of ownership as to confer the property on the buyer. To this it is necessary that the seller shall have the full right of disposal of the thing, either as owner, or as expressly or impliedly authorized by him; that the thing shall be properly separated and prepared for delivery, and either tendered to the buyer, or placed so as to enable him to take it at his pleasure; and that it shall be accompanied by all necessary permits and protections, free of all claims for duties, warehouse rent, and burdens of debt.

Where the sale is by the owner, the only question that can be raised by the buyer objecting to proceed under a concluded contract, will rest on the warrandice in case of pretensions by other parties to the property of the goods.

But questions of difficulty have arisen where the person by whom the goods were sold was either not proprietor of those goods; or the goods, though his, were burdened with rights in favour of other persons; and the law, as established in different countries, has recognised several distinctions.

In England, although the right of disposal is in the general case uncontrolledly in the owner, yet if judgment has been obtained against him for a debt or damages, and the writ of execution has been delivered to the Sheriff, the property of his goods is bound to answer the debt, and no sale can effect-

(*a*) Domat, liv. 1, tit. 2, sec. 2, No. 14, et seq; Pothier Cont. de Vente, No. 50. 52; Toullier, vol. 8, p. 226; 1 Stair, 17, 18-19; 2 Blacks. Com. 448; 2 Kent, Com. 492.

ually be made of them.(*b*) But a valid sale may still be made after *such writ is in the hands of the Sheriff, provided it be made in market overt.(*c*) [*80]

A sale may also be effectually made in certain cases, although the seller is not proprietor of the goods sold. If the sale be made in market overt, it is good, although the person who sells should have stolen the goods or found them, provided he be in the apparently lawful possession of them.(*d*) Market overt is held in London to be every shop in which goods are exposed for public sale of a kind in which the shopkeeper professes to trade.(*e*) In the country, a market is only that which is held in the market-place, and on the proper market-day appointed for the sale of such goods.

In Scotland, the goods of a tenant are hypothecated to his landlord for rent, and this right continues for three months after the term at which the rent is due; and an effectual sale cannot be made of them unless such sale take place in open market, and the goods be then sold in bulk, and not by sample.(*f*)

Sale in open market does not secure the purchaser against a claim of restitution by the true owner, where the goods have been sold by one who has stolen them.(*g*)

Mercantile factors and agents having possession of the goods intrusted to them by their principals, are *entitled to sell them, or even to pledge them, for advances.(*h*) [*81]

The rules relative to delivery have effect either in an action by the seller for payment of the price, or in an action by the buyer for performance. In the former, the question is, What is the seller bound to show as to delivery or tender of the goods, in seeking payment of the price or damage for non-fulfilment of the contract? In the latter, the question is, what the buyer is entitled to insist for, when he brings his action for the delivery of the goods?

In either of these respects in which the seller's duties may come into question, the delivery must be offered, or made, according to the stipulations of the contract, or the nature of the commodity; and either to the buyer himself, or to one duly authorized by him, or to a carrier, ship-master, wharfinger, or other such person as the parties may have agreed on; or in such way as, by the implied contract, may be pointed out; or, if the goods are too bulky, by delivery of the key of the repository in which they are, or by an order or notice to the custodier or keeper of the warehouse in which they are deposited, or by indorsement of bill of lading, dock-warrant, or other instrument by which, according to the custom of merchants, goods in that situation are transferable.

The question, What shall be the effect of the several acts of delivery, or of leaving them incomplete as to the right of stopping in transitu, will be con-

(*b*) 2 Blackst. Com. 447. (*c*) Eq. Cases Ad. 381.

(*d*) 2 Blackst. Com. 449.

(*e*) 2 Blackst. Com. 449; Wilkinson v. King, 2 Camp. 335; 1 Bell's Illus. p. 158 and p. 326. See, however, the special regulations of the stat. 7th and 8th Geo. IV. c. 29, § 57, as to goods sold by convicted felons.

(*f*) Dunlop v. Earl of Dalhousie, 27th Feb. 1828. Affirmed by the House of Lords, 7th Dec. 1830; 4 W. and S. 420.

(*g*) Henderson v. Gibson, June 17, 1806; Mor. Moveables, Ap. 1. See this and other cases cited, 1 Bell's Illus. p. 417-18. (*h*) See above, p. 75.

[*82] sidered hereafter.(i) At present, the question is, What the seller *is bound to do, or to shew he has done in fulfilment of his part of the contract, either when seeking his right under the contract, or when called on by the buyer in an action for implement.

The first distinction to be marked is between a certain specific commodity sold; and a thing, or quantity, or number of commodity sold indefinitely.

When a certain specific commodity is sold, the question of delivery can occasion little doubt, if the bargain be not clogged with conditions. As soon as the thing is clearly separated and distinguished as bought and sold, it is, in the seller's hand, according to the law of England, as the property of the buyer, transmuted by the completion of the contract. By the law of Scotland, although the property is not yet passed, but remains in possession of the seller for delivery, he is bound to deliver it when the buyer offers payment of the price, or has actually paid or complied with the terms of credit agreed upon; and it lies at the buyer's risk till he takes it away. If the seller demand his price, he must, according to the law both of England and of Scotland, shew that the thing lies thus ready for the buyer, and that the buyer is in fault in not taking delivery.

If a commodity is sold indefinitely, as a horse, or a pipe of wine, or 100 quarters of wheat, the seller is bound to separate and identify the particular thing or quantity sold, to which the obligation of the seller and the right of the buyer is to attach. Till this be done, it cannot be said that the seller has done his part, that the property or risk is changed, or that the seller is entitled to the price, or to his action for payment.

Where the sale is of a quantity or of several articles at the same time, the [*83] seller is not discharged of his obligation *to deliver by giving a part; nor is he entitled on doing so, to insist for the price of the part so delivered, his obligation being for the whole. Thus, if I buy 300 quarters of wheat, to be delivered on a certain day, and the seller has no more to deliver than 150, I am not bound to take part, nor is he entitled to the price of what is so delivered, unless I choose to keep it at that price. For, in trade, I may have in contemplation what is utterly defeated by a partial failure, and I may not only reject the imperfect performance, but claim for damages in consequence of disappointment.

In England, where, in a bargain for flour, some sacks had been kept back by the seller, he was held not entitled to claim the price of what was tendered for delivery.(k)

In Scotland the same doctrine is recognised, as where a person ordered a quantity of seal oil, and one half only was tendered for delivery, it was held that the buyer was not bound to take the half.(l)

But although the presumption in the general case is, that all the articles ordered at the same time form an entire contract, yet the rule is different where either the nature of the contract contemplates the possible delivery of a part only, or where the buyer acquiesces in the delivery of a part, as fulfilment of the contract to that extent. So in England, where the commodity was referred to a particular test, the buyer was held bound to take so much of it as answered the test.(m) In like manner, where the buyer having given

(i) See below, p. 113.
(k) Walker v. Dixon, 1817; 2 Starkie, 281.
(l) Richardson v. Roscoe and Rigg, May 18, 1837; 15 S. 952; 3 Bell's Illus. p. 105.
(m) Graham v. Jackson, 1811; 14 East, 498.

an order for *several articles, took one article and rejected others, [*84] it was held, that although this might at first have been dealt with as a joint order, so that the seller's obligation would not have been discharged by delivery of one article, the buyer had, by receiving one, severed the contract, so as to entitle the seller to payment of the thing delivered.(*n*)

The question, whether the seller has fulfilled his obligation to deliver, may depend on some special stipulation as to mode, or time, or place. Thus,

By special bargain, or by an order acquiesced in, the seller may undertake the duty of making the delivery, instead of leaving it incumbent on the buyer to send for it. In such a case, until the act of delivery be performed by the seller, the goods are at his risk, and his obligation unfulfilled.

The seller may expressly or tacitly undertake to give the goods into the hands of a third party; to a wharfinger, or agent, or carrier, or shipmaster. He will, in that case, be bound to perform such an act of delivery as shall fix the goods effectually on the proper person, so as to confer on the buyer the benefit of his purchase, or enable him to insist for his goods against a proper party. When the seller has done this, he is discharged of his duty; till it is done he can have no action for the price, and the risk is still his.

Thus, in England, goods bought were ordered to be sent by land carriage, and were accordingly put in charge of the Birmingham carrier, to be sent to Carmarthen, which was the only mode of land carriage to Carmarthen. They were lost on the road; and the *question was, Whether the seller did [*85] his duty in the delivery so as to alter the risk. Lord Mansfield, in pronouncing the judgment of the Court, said, "The case is as if the defendant had mentioned the Birmingham carrier particularly by name, for there being but one carrier the plaintiff had no choice by whom to send them. If a vender take upon himself actually to deliver the goods to the vendee, he stands to all risk; but if the vendee order a particular mode of conveyance, the vender is excused."(*o*)

In another English case where goods were ordered to be sent by the carrier, they were delivered accordingly, but by some neglect were so long delayed as to be liable to seizure by expiration of the permit. Lord Kenyon at the trial, and the Court of King's Bench afterwards, held the delivery to be complete, by fixing the goods on the carrier, and so the legal right and the risk were transferred to the buyer.(*p*)

Again, where goods were delivered to a carrier for the buyer, the seller having agreed to pay the carriage, Lawrence, J. said, "The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him the property vested in the defendant. The plaintiff by paying the carrier did not become insurer of the spirits while in his hands."(*q*)

The same point was held settled in a case in Common Pleas, where Lord Alvenley said, "It is a proposition as well settled as any in law, that if a tradesman order goods to be sent by a carrier, though he does *not name any [*86] particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, the whole property immediately

(*n*) Champion v. Short, 1807; 1 Camp. 53; 1 Bell's Illus. p. 83.
(*o*) Vale v. Bayle, 1775; Cowp. 294; 1 Bell's Illus. p. 109.
(*p*) Dawes v. Peck, 1799; 8 Term Rep. 330.
(*q*) King v. Meredith, 1811; 2 Camp. 639.

vests in him; he alone can bring an action for any injury done to the goods; it is at his risk. The only exception to the purchaser's right over the goods, is, that the vendor, in case of the former becoming insolvent, may stop them in transitu. On this part of the case the Court never entertained a doubt."(r)

Finally, in a case tried before Lord Ellenborough, he laid it down, "That when nothing is said as to any carrier, according to common sense it is to be understood that the goods are to be delivered in the most usual or common way."(s)

In Scotland the same doctrine is established. In a case where a merchant in Leith bought a cask of oil in London, but said nothing as to the mode of sending, it was delivered to the wharfinger of the London and Leith Shipping Company, and put on board one of their vessels, but on arrival at Leith was found to have all leaked out. The Court held the delivery by the sellers to have been sufficient for a verdict, and that the question, therefore, lay with the Shipping Company on their contract as carriers.(t)

But it is not sufficient merely to *deliver* the goods to the carrier or another person. They must be legitimately fixed with him.

[ *87 ] *Thus, where chairs had been ordered from a chair-maker, and had been carried to the wharf and left there, addressed to the defendant, and no receipt was taken, and no entry made, and the servant saw a man at the wharf, whom he supposed to be a servant, but did not know his name, and could not recognise him, Lord Ellenborough held, that a delivery of goods to a carrier or wharfinger with due care and diligence, is sufficient to charge the purchaser; but he has a right to require that, in making this delivery, due care and diligence shall be used by the seller. Before the defendant can be charged in the present case, he must be put in a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs, they were not booked, and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or to some person who can be proved to be his agent for the purpose of receiving them. The person upon the wharf, when the chairs were left, might have been a thief watching for an opportunity to purloin them. The defendant, therefore, is not furnished with a remedy against the wharfinger, and is not himself liable as purchaser.(u)

It has been doubted how far it is the duty of the seller undertaking to send goods, not only to fix the goods with a carrier, but to enter them so as to secure responsibility for their full value. The rule seems to be, that the delivery must be made according to the usual practice; and that, although one is not bound to insure goods sent by sea; yet, if it be the practice to

[ *88 ] *pay according to the value in land carriage, the delivery is not complete unless so made. This seems to have been doubted by Lord Ellenborough, when the question was first moved, but afterwards the Court of King's Bench settled the question according to the above rule. The first case was a special one, Lord Ellenborough holding that it depended on the usage of the parties in former transactions; but he said, "upon the general

(r) Dutton v. Solomonson, 1803; 3 Bos. & Pul. 582.
(s) Copland v. Lewis, 1817; 2 Starkie, 33, N. P.; 1 Bell's Illus. p. 108.
(t) Jones and Co. v. Ross, 12th February 1830; 8 S. 495; 1 Bell's Illus. p. 138.
(u) Buckman v. Levi, 1813; 3 Camp. 414; 1 Bell's Illus. 109.

question, it is a practice so unusual, under these notices, to enter and insure goods as above the limited value, that I should be inclined to hold that the vender is not bound to do so without express instructions for the purpose. Were he to insure of his own accord with the carrier, how far would the purchaser be liable for the heavy expense thus incurred?"(v)

But in the next case,(w) where goods of the value of £50 were sent to the receiving house of a ship in the carrying trade, but were not entered and paid for, as for that value, although the carrier had advertised against responsibility above £5, unless with such entry, Lord Ellenborough (the rest of the Court assenting) held that the plaintiff could not be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, not having taken that mode which the notoriety of the carrier's general undertaking required, to insure them a safe conveyance, viz. by making a special entry of them. Under his implied authority, it was his duty to do whatever was necessary to secure the responsibility of the carrier for the safe delivery of the goods, so *that the defendant might have his indemnity. The true ground on which this judgment seems securely to rest is, that an entry with notice is the common and uniform practice of all consigners; and it may be added, that, since the statute 1st Will. IV., c. 68, the rule is still more imperative, requiring the entry of the goods, with notice of the value, and payment of the additional consideration. [*89]

In delivering goods on shipboard, the seller is bound not only to charge the shipmaster or shipping company with them effectually, but, though not bound to insure, he must give such notice as to enable the buyer to insure.

There are some good illustrations of this rule in several Scottish cases.(x) When the question first arose, it was not held necessary to send a bill of lading or letter of advice.(y)

In the subsequent cases, two questions were raised as to the information to be communicated by the seller, in order to complete his duty, viz. As to the time of sailing; and, As to the name of the ship.

As to the *time* of sailing, it is important, as the buyer must be able to determine whether he himself shall take the risk, or shall insure as on a missing ship; and must be able, if he do order insurance, to state to the underwriter the time of departure. In a Scottish case,(z) goods ordered were delivered to a shipping company, to be carried to the place of residence of the buyer. Three *days after they had sailed in a smack belonging to that company, the seller sent an invoice to the buyer, saying the goods had been sent, but without saying that the smack had sailed some days before. The buyer not having insured, and the goods being lost, he refused to pay for them, on the ground that the seller was bound to give notice of the day of shipment, in order to transfer the risk, and that the buyer was misled as to time, the invoice fairly inferring the goods not to have sailed on the 27th, while they were at sea three days before. The Court of Session dismissed the seller's action, holding, that the buyer was entitled to be his own insurer, till he should see whether the ship was behind her time, and that the seller's [*90]

(v) Cothay v. Tute, 1811; 3 Camp. 129; 1 Bell's Illus. p. 109.
(w) Clark v. Hutchins, 1811; 4 East, 475; 1 Bell's Illus. p. 110.
(x) 1 Bell's Illus. p. 110, No. 10, et seq.
(y) Hoog v. Kennedy, 24th July 1754; Mor. 10096; 1 Bell's Illus. p. 110.
(z) Arnot v. Stewart, 25th Nov. 1813; Fac. Coll.; 1 Bell's Illus. p. 111.

false information had deprived him of the power of judging on that question of risk.

In other Scottish cases, the same rule had been followed.(*a*)

As to the *name* of the ship, the general rule is, that if it be mentioned at all, it must be correctly given, but the name need not be mentioned, as the buyer may insure effectually by ship or ships. In the particular case, however, of sending goods by a shipping company, the usage of trade has introduced another rule. It is the practice of such companies, and well known in trade, that when goods come in which prove too much for one of their ships, they hand them over to another of their ships equally fit and ready for the voyage, and this even when the receipt bears the goods to be received for sailing by a particular ship; and as insurance can *be made effectually for the voyage "by ship or ships," the delivery is well made, though the ship should be changed.

[*91]

This was held in England in several cases. Thus, where a commodity was sent on a receipt,—"The Commerce, C. Farquharson, for Bristol, 17th Decr. Received 13*s.* 6*d.* J. M.;" and the same day notice was sent to the buyer that the Commerce was to sail in January for Bristol. The shipping company, according to their common practice when too many goods came for one vessel, sent the commodity by their next ship, the Nancy: when the price was demanded, the buyer refused to pay. The Court held the seller to have sufficiently fulfilled his duty of delivery.(*b*)

In Scotland the same rule has been followed. Thus, where three boxes of tea were ordered and delivered at the wharf of the Berwick Shipping Company, and a letter of advice was sent that they were to go by the Kelso packet, which afterwards was changed to notice of their being to sail by the Union packet, but after all they went by the Kelso, and two chests were lost, and the third damaged; the buyer refused to pay, in respect that the delivery is duly made only when the goods are fairly shipped and advice sent, but here false information was transmitted; but the Court held him liable, on the ground that the seller had reason to believe the information to be correct; that the buyer had it in his power, according to the custom in that trade, to insure on ship or ships; that the goods being collected in the warehouse for sending by the Shipping Company, they are distributed as most convenient; that no reliance can be or is placed on any particular ship *being that by which the goods shall go; and that the goods being fixed with the Shipping Company, the question thenceforward lay with them.(*c*)

[*92]

If a special contract be made, or directions given by the buyer and acquiesced in by the seller as to shipping, carriage, or other accompaniments of delivery, they give the rule. In Scotland this was recognised in a case where sugars were ordered to be shipped "if the convoy was not sailed," with directions that "if the ships be all sailed, there is nothing for it but to wait the first convoy." The convoy had sailed, but the seller shipped the sugars in a vessel which was to overtake and join the convoy. This vessel made a run and escaped the enemy, but the sugars were damaged. It was

(*a*) Andrew v. Ross, 6th Dec. 1810; 1 Bell's Illus. p. 111. Johnson and Sharp v. Baillie, 2d June 1815; 1 Bell's Illus. p. 112.

(*b*) Cooke v. Ludlow, 1806; 2 Bos. and Pul. 119.

(*c*) Hesseltyne v. Arrol & Co., 15th Jan. 1802; Mor. 10,111; 1 Bell's Illus. p. 110. Confirmed in Elton, Hammond, & Co. v. Porteous, 13th Dec. 1808; 1 Bell's Illus. p. 111.

held a good defence against payment of the price, that the seller had not observed the terms of the order in detaining the goods. The Lord-President said that the property was not transferred by putting on board, as if the order had been observed; and that although if the sugars had been safe, it might have been no reason for refusing to receive them, that they had not come under convoy, yet as they came not safe, and were not transferred before arrival, the risk could not be the buyer's.(*d*)

The same rule is followed in England.

In giving particular directions as to delivery, there are some peculiarities which must be observed in the mode of transferring goods under bond, and which generally are stipulated. Where sugars, for example, in Great Britain *are sold for exportation, the seller is entitled to a bounty intended to encourage our sugar colonies, and it is usual for the purchaser [ *93 ] for exportation to have a ship on board of which the seller puts his goods and receives his bounty. In such case, unless it be otherwise stipulated, the seller is not bound to deliver the goods to a foreign buyer or his agent, but is entitled to insist on putting them on board a foreign ship himself. This was held in a case where sugars in bond were sold by a note bearing "Bought 95 hogsheads, double loaves, at 78*s.*, *free on board a foreign ship*, prompt two months—a bill at two months with interest." The buyer required the seller to weigh off and deliver the sugars to him. The seller refused to do any thing but to put the goods on board a foreign ship. Lord Ellenborough said, "The delivery for which the plaintiff undertook was on board a ship, to be named by the defendant; and he was always ready so to deliver the sugars, and offered to do so. But the defendant, instead of naming a ship, demands to have the sugars weighed off and delivered into his own hands, or transferred to his own name in the warehouse-keeper's books. The seller might have been exposed to some risk, or might have lost some advantage by agreeing to this, and he had a right to refuse, as it was not the mode of delivery for which he had stipulated." The jury fully concurred in this construction of the contract.(*e*)

The stipulated place of delivery is often important in the construction of the contract, and the seller does not complete the contract unless he comply with the direction.

*The general rule, independent of special agreement, is, that the seller's obligation to deliver is only at the place where the thing is [ *94 ] when sold. Domat says, "Delivery is to be made at the place agreed on, or if none be stipulated, at the place where the thing sold happens to be, provided there be no indication of any intention that the delivery shall be elsewhere.(*f*)

Pothier lays down a similar rule: "If no place be expressed, the delivery ought to be where the thing is, and thither the buyer must send to demand it, the seller having no right, without necessity, to remove it to any other place, where the delivery may be more difficult or expensive to the buyer, at least without indemnifying the buyer."(*g*)

If the contract relates to fungibles indefinitely, to be delivered at a particular place, the goods are, till the delivery at the place appointed be performed,

(*d*) Harle v. Ogilvie, 24th Jan. 1749; Mor. 10,095; 1 Bell's Illus. p. 109.
(*e*) Wackerbath v. Masson, 1812; 3 Camp. 270; 1 Bell's Illus. p. 112. See also Austen v. Craven, 1812; 4 Taunt. 644.
(*f*) Domat, liv. i. tit. 2, § 2, No. 15. (*g*) Pothier, Con. de Vente, No. 52.

in all respects the property of the seller, and of course the risk is with him. Thus, in Scotland, it was held that a quantity of barley sold, to be delivered at Stirling shore, was at the risk of the seller till delivered at that place.(*h*)

The doctrine is similar as to the *time* of delivery. The seller is not bound to deliver, nor the buyer to receive the goods, till the time appointed, nor is delivery to be delayed beyond it.

[ *95 ] 2. *Warranty.*—(1.) *Of Title.*—As no one can justly *sell anything without having a full title of ownership, or at least a right to dispose of the subject which he sells,(*i*) he, by the act of selling, gives an implied assurance to the buyer that he holds such powers as effectually to make the transfer to him. This assurance resolves into a right on the part of the buyer, and corresponding obligation on that of the seller, that the buyer shall be safe against eviction or disappointment from other parties.

1st, The seller is bound to protect the buyer from all evictions arising from circumstances anterior to the sale, of which the cause or the germ existed at the time of the sale, as debts chargeable on the thing sold, revenue duties to which the goods are liable, or such defects in the seller's title as form a labes realis.

2d, The seller is liable for evictions which, though taking place after the sale, proceed from a previous act of the seller, as for revenue duties arising subsequent to the sale, but for which a hypothec is given over all the moveables which belong to the trader at the time the duties should have been paid. Strictly speaking, eviction is by judicial sentence only; but where a clear right appears in the evictor, and the only consequence of resistance would be to accumulate expense, the buyer will be entitled to abandon the thing, and to insist on the seller's warranty.

This general doctrine is laid down as a necessary result of the principles of the contract by the institutional writers of all countries.(*k*)

[ *96 ] *Ownership in common moveables being presumed from possession, no objection is pleadable to suspend the bargain on mere suspicion or probability of a challenge of the ownership.

The effect of eviction is to make the seller liable on his implied obligation for the price paid, and the whole loss or damage directly occasioned by the eviction, deducting the intermediate profits drawn.

(2.) *Warranty of Quality.*—This may be implied or express.

IMPLIED WARRANTY.—In the doctrine relative to the implied warranty of quality, there is a remarkable distinction between the laws of Scotland and France and those of England and America.

In the Roman, and in the Scottish, and French law, an obligation is understood to be undertaken by the seller that the thing sold at the full price, is of quality suitable to the declared or avowed purpose of the purchaser,(*l*) and

(*h*) Milne and Co. v. Millar, 1st Feb. 1809; Fac. Coll.; 1 Bell's Illus. p. 88. Confirming Spence v. Ormiston, 25th Jan. 1687; 1 Fount. 442; Mor. 3153; 1 Bell's Illus. p. 88.

(*i*) See above, p. 79.

(*k*) In England, 2 Backst. 451; Cress v. Gardener, 1689; 3 Mod. Rep. 261. Medina v. Stoughton, 1700; 1 Lord Raymond, 593. See also Pasley v. Freeman, 1789; 3 Term Rep. p. 59; 1 Bell's Illus. p. 208.—In Scotland, 3 Ersk. 3. 9; and 2 Ersk. 3, 30.—In America, 2 Kent's Com. p. 478.—In France, Domat, lib. 2, tit. 2, § 10; Pothier Tr. de Vente, No. 81; Code Civile, § 1625 et seq.—In Holland, Van Leeuwen, Com. on Roman-Dutch Law, p. 384.

(*l*) 1 Stair 9, 10, 11; 3 Ersk. 3. 10; 2 Pardessus, No. 282, et seq.; 1 Bell's Princ., § 93, with the authorities there cited. Muil v. Gibb, June 27, 1840; 2 D. 1227.

generally that the article is of merchantable quality, not merely that it will sell at market, but that it will bring a fair average market price.(*m*) This implied undertaking suffers exception only in the case of faults so obvious that they cannot be supposed to *escape ordinary observation,(*n*) the law never implying an engagement to warrant an article different from [*97] what it obviously appears to be, but the natural presumption being that the seller parts with it, and the buyer means to take it, according to its manifest and obvious appearance.

This doctrine of the implied meaning and undertaking of the parties is, in those countries, thought to operate wholesomely in the avoiding of law-suits and preventing the defeating of bargains on slight and frivolous pretences.

In England,(*o*) a different view has been taken; and, after much discussion in America, it has been there adopted almost universally.(*p*) The great maxim of the English common law on this subject is, not to interfere with bargains, but to hold every man who enters into a contract to be able and bound to defend himself, instead of trusting to the interposition of the law to supply that ordinary vigilance and common sense which every man should exert for himself, and which it is held most expedient to maintain and encourage. The general rule thus established is *Caveat emptor:*—Let every man look to his own interest, and be vigilant to observe defects in what he buys, or to stipulate a special warranty.

*But to this general rule there naturally is an exception, where [*98] the buyer is misled by fraud, deceit, or undue concealment; and on this ground there at one time arose some tendency to disturb the general rule, The principle of the law of England being, that, by the completion of the contract, the property of the thing sold is transmuted, so that, strictly under the contract there being no remedy to the buyer, every case of a breach of warranty came to be tried on one of two grounds,—1. On a special warranty by assumpsit; or, 2. On an action for deceit, in which the buyer relied on being able to prove that the seller, directly or indirectly, had deceived him into a sale, being aware of a fault which was not manifest; as, for example, that a jeweller skilled in precious stones, had sold as a jewel what was only some common fossil. In this way arose in England the doctrine that wilful misrepresentation, studied concealment or suppression of a known fault, raised an implied warranty, contrary to the general rule of *caveat emptor*. And gradually a considerable relaxation took place in the whole doctrine.

Instead of the action of deceit, that of assumpsit was adopted for all such cases, *i. e.* that there had been an undertaking, express or implied, that the commodity sold was, in the fair meaning of the contract, such as the contract and price indicated; and that, if it should prove otherways, the buyer should have his action for deduction from the price, or for indemnification if the price were paid. This construction is said to have been introduced by Lord Holt, who having ruled that an affirmation at the time of the sale was a warranty,

(*m*) Wheeller v. Methven, Jan. 9 and 10, 1843; 5 D. 402.

(*n*) See Gilmer v. Galloway, 8 S. 420, 1 Bell's Illus. p. 99, where a cow having been sold, and having died in six weeks after, of an internal injury existing at the time of the sale, though unknown, the buyer was held entitled to have back the price. Contrast with this the case of Muil v. Gibb, June 27, 1840, 2 D. 1227, where the buyer of wheat, having seen and examined it, was not entitled afterwards to reject it on the ground of its not having been properly dressed.

(*o*) 2 Blackst. 452; 2 Comyn on Cont. 263. (*p*) 2 Kent, Com. 478 and 479.

provided it appeared in evidence to have been so intended, a whole class of constructive warranties was let in.

[*99] *One of the most natural and obvious indications of warranty under this course of administration, was attempted to be made out, on the ground that, as a full price could be agreed to only for a sound article, this inferred that the seller, by taking the price, gave his assurance as an honest man that it was so.

But this was at last rejected as a sufficient indication of a warranty.(r) It has, however, been held,

1. That parties dealing in a particular line of trade are understood to conform to its usage;(s) so, where, in the sale of a commodity, the custom of trade is to specify whether it has received sea damage, the omission to state this fact raises an implied warranty that it is undamaged.

2. That the article shall answer to its description, as understood in the trade; Thus a sale of *waste silk* was held to imply a warranty that the article was that which goes in the market by that denomination, though it was not a warranty of any particular fineness or quality.(t) The same was held as to *scarlet cuttings*.(u)

3. That in regard to articles sold by a dealer, which the buyer has had an opportunity of examining, there is no implied warranty, further than that the article should be of the description purchased; but that, in regard to an article

[*100] ordered from a *manufacturer*, he is *under an implied engagement that it shall be fit for the avowed purpose.(v)

Where the article is objectionable for a breach of warranty, express or implied, it may, in Scotland or France, be rejected, provided that is done as soon as the defect is discovered, to the effect of the buyer being entitled to be free of the bargain, and of the payment of the price, or to recover the money, if the price had been paid.(w) In England, the breach of warranty does not seem to entitle the buyer to send back the goods, but only to demand an abatement in the price, or to recover from the seller indemnification for the loss sustained by the defect.(x)

The English lawyers contend, as the result of the whole doctrine,

That in the simple sale of goods and merchandise, there is, in the general case, no implied warranty of quality.

That from usage of the particular line of trade, a warranty may be implied.

That the executory contract with, or order to, a manufacturer, implies a a warranty that the article shall be fit for the purpose of the order. But, finally,

(r) Parkinson v. Lee, 1802; 2 East, 314; 1 Bell's Illus. p. 97. Budd v. Fairmaner, 1831; 8 Bingh. 48; 1 Bell's Illus. p. 117, Baglehole v. Walters; 3 Camp. 154; 1 Bell's Illus. p. 98. (s) Jones v. Bowden, 1813; 4 Taunt. 847.

(t) Gardiner v. Gray, 1815; 4 Camp. 144; 1 Bell's Illus. p. 98.

(u) Bridge v. Wain, 1816; 1 Stark. 504; 1 Bell's Illus. p. 92. Laing v. Fidgeon, 1815; 6 Taunton, 108; 1 Bell's Illus. p. 98.

(v) Jones v. Bright, May, 1825; 5 Bing. 533; 1 Bell's Illus. p. 101. Gray v. Cox, 1825; 4 Barn. and Cr. 108; 1 Bell's Illus. p. 99.

(w) Watson v. Stewart, 5th Jan. 1694; 1 Fount. 589; 1 Bell's Illus. p. 102. Baird v. Aitken, 13th Feb. 1788; Mor. 14,243; 1 Bell's Illus. p. 102. Hill v. Pringle, 11th Dec. 1827; 6 S. 229; 1 Bell's Illus. p. 102–3. Seton v. Carmichael, 28th Jan. 1680; Mor. 14,234, and other cases; 1 Bell's Illus. p. 101–4; 2 Pardessus, No. 286, et seq.

(x) See Curtis v. Hannay, 1800; 3 Esp. 82. Street v. Blay, 1831; 2 Barn. and Ad. 456.

*That beyond these relaxations, the old rule of the law is good, as being clear and peremptory, while the modern tendency to greater looseness of implication promotes vexatious litigation. [*101]

In contrasting, then, the law of England and of Scotland it may be stated—

1. The law of Scotland gives an implied warranty of merchantable quality, unless the fault be open to ordinary observation, the article being shewn to the buyer and taken by him without objection.

2. In England the buyer is his own merchant, and has no implied warranty to rely on, unless there be a distinct usage in the trade, or a latent fault known to the seller and fraudulently concealed, or the condition of the thing misrepresented, or in the case of an executory contract by a manufacturer.

3. Practically in England if the buyer is not satisfied, or is suspicious of any thing wrong, he is to protect himself by a special warranty. In Scotland, if the seller is not sure of his goods, he sells without warranty, which makes the buyer look sharp in taking the article with all its faults.

4. A sale of an article "*with all faults*," avoids every warranty on the part of the seller, who can then be made liable only for fraud.

5. Where a particular purpose is avowed, there is in Scotland an implied warranty that the article shall be fit for it; but in England there is no such warranty implied, except in an article manufactured on order.

6. The thing bought must, if it is meant to be challenged on a warranty, express or implied, be instantly rejected, in Scotland; or notice given of the objection in England; that is to say, as soon as the buyer has a *fair opportunity of being aware of the breach of warranty. [*102]

7. In England the remedy in case of breach of warranty is to give to the buyer an abatement of the price, or indemnity for the loss, by defect in the quality, while in Scotland the buyer is entitled to reject the article and claim damages for any loss sustained from the disappointment.

EXPRESS WARRANTY.—Express warranty is introduced to alter the implied contract, or to give an assurance which law alone will not give.

The warranty implied in the law of Scotland extends only to the present condition of the thing. In order to warrant de futuro, there must be an express warranty, as in the sale of a horse, that he will be sound some months after the sale.

It was at one time held in England, that no such warranty could be granted, and so it is laid down, 3 Blackst., 166. But Lord Mansfield denied this to be law,(*y*) and said,—"There is no doubt but you may warrant a future event."

The specifying of the quantity has the effect of a warranty. Such questions most frequently occur in sales of land, but they may arise respecting commodities sold by number, weight, or measure.

In sales of horses it is often questioned what the meaning and extent is of a warranty of soundness. It seems to comprehend,—All constitutional diseases affecting life; All injuries affecting life in the consequence; All diseases and accidents attended with lameness, or tending to render the horse prematurely unfit *for work; All defects or bad habits indicative or symptomatic of disease; And of slighter faults, bad corns, running [*103]

(*y*) Eden v. Parkinson, 1781; Douglas, 705.

thrush, roaring proceeding from organic defect, and invetrate crib-biting.(*s*)

## II. *Obligations of the Buyer.*

The obligations incumbent on the buyer, independently of special bargain, are—1. To pay the price; and, 2. To take delivery of the thing.

1. *To Pay the Price.*—When the bargain is simple and without special stipulation, the buyer's obligation is to pay immediately, and the seller is entitled to demand and have action for payment,—On offering delivery of the thing, or proving the delivery made; or, On shewing that the thing has perished by accident.

The seller is entitled to payment in a legal tender. The ordinary circulating medium of the country will be sufficient if not objected to; but if refused, that which is the legal tender by the law of the country will alone suffice to entitle the buyer to his action for delivery.

In Great Britain and Ireland the price may be exacted in gold if above 40*s.* (56th Geo. III. c. 68,) or in such bank notes as are by 3d and 4th Will. IV. c. 6, § 68, made legal tender. Such tender must be made immediately, or on such condition only as the bargain authorizes.

By the law both of England and Scotland, if, instead of money, the seller [*104] desires the buyer to send *a bill by post, or where that is the usual course of remittance, the loss of it is at the risk of the seller. As where a bill so sent having fallen into bad hands, and the contents being received at a banker's, the price was held to be paid.(*a*)

If the seller take the note of a third party in payment, he takes it either with an indorsement, and on that will lie his remedy; or without recourse, and then he limits his demand; or simply by the third party giving a note to him instead of his own debtor giving it, and that seems to be nearly the same with a bill indorsed without recourse.

If the seller take the buyer's check on his banker, his account being overdrawn, or a draft on one having no funds of his, it is a fraud, and is held not to be satisfaction of the price, but only as prima facie evidence of payment. Thus, in a case where a draft was given in payment on one who had no funds of the drawer in his hands, Lord Kenyon, Chief Justice, said, "That if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given, and that it had been so decided in many cases occurring at Nisi Prius."(*b*)

The same rule has been applied where a banker's notes were taken without agreement to receive them as money, and the banker failed next day. The Court held, that if the defendant had agreed to take the notes as pay- [*105] ment, and to run the risk of their being *paid, that would have been considered as payment whether the notes had or had not afterwards been paid, but without such agreement the giving of such notes is no payment.(*c*)

(*s*) See Mr. Justice Coleridge's Note (21), 2 Blacks. p. 166, and 1 Bell's Illus. p. 114 and 115.

(*a*) Warwick v. Noakes, 1791; Peake's Cases, 67.

(*b*) Puckford v. Maxwell, 1794; 6 T. Rep. 52.

(*c*) Owenson v. Morse, 1796; 7 T. Rep. 64. Swinyard v. Bowes, 1816; 5 Maule and Sel., 62. Tapley v. Martins, 1800; 8 T. Rep. 450. Taylor v. Briggs, 1827; 1 Mood. and Mal. 28.

The result of these cases seems to be, that if the bill or note given in payment be bad, the buyer is not discharged.

But there is an exception to the general rule, and such a note may operate as payment, if by the seller's undertaking or negligence, or fault, he make it his own, though it should ultimately produce nothing.

Thus, it has been held in King's Bench, that if the seller discount the note or bill for the price, without making himself responsible for the money, this is an approval of the bill, and he makes it his own; he in that case receiving payment of the price, which cannot be recalled from him.(*d*) But if the seller has discounted the bill with an indorsement, making himself responsible, it is not to be held as a payment; for the price in that case is not effectually and conclusively paid.(*e*)

So, if the seller agree to receive the note or bill as cash, and undertake the risk of it, discharging the buyer of responsibility, should it be dishonoured, it will operate as payment, and discharge the buyer, though dishonoured. Thus, where wine was sold by intervention of a broker, and the broker's note was *"to be paid for by a bill, without recourse on the buyer, in case of its not being paid," Lord Ellenborough held, "that, according to the broker's note, the wines were not to be paid in money, but to be bartered against a bill of exchange; and it was expressly stipulated that the buyer was not to be liable in case the bill should be dishonoured. Therefore he never was indebted to the plaintiff for the price of the wines."(*f*) [*106]

So, where the seller takes a note from a third party, *in preference* to cash which, on the purchaser's order, he is ready to pay, he undertakes the risk. Thus, where a commodity was sold and delivered on receiving in payment a note on a banker to pay to the seller £193, the banker, on the presenting of this note, said the seller might have the whole in cash; but he preferred to take an order for £100 at three months, and the rest in bank-notes. The bill was dishonoured. The Court held that, having waived the right to immediate payment and taken the security, the seller must bear the loss which had happened through his own default.(*g*)

Such a case is different from that in which the seller takes from the buyer or his agent a draft which is dishonoured; and so in the above case the Court distinguished it from a case where a check on a banker having been given for the price, and presented immediately, it was refused, as the maker of the cheque had overdrawn his account and failed the same day. Lord Ellenborough said, that in the ordinary case, if a creditor prefer a bill of exchange, accepted by a stranger, *to ready money from his debtor, he must abide the hazard of the security he takes. But there is no pretence for saying that a debtor is discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered.(*h*) [*107]

If the seller, taking notes or cheques, is guilty of negligence or laches, by which a loss arises, it is equivalent to payment. So in England, where notes

(*d*) Bunney v. Poyntz, 1833; 4 Barn. and Ad. 568; 1 Bell's Illus. p. 383.
(*e*) Miles v. Gorton, 4 Tyrwhitt, 295; Tarleton v. Altensen, 2 Ad. and Ell. 32.
(*f*) Read v. Hutchinson, 1813; 3 Camp. 352.
(*g*) Smith v. Ferrand, 1827; 7 Barn. and Cress. 19; 1 Bell's Illus. p. 113.
(*h*) Everett v. Collins, 1810; 2 Camp. 515; 1 Bell's Illus. p. 112, confirmed in Marsh v. Pedder, 1815; 4 Camp. 257; 1 Bell's Illus. p. 268.

of a banker were given in payment, and the seller had neither circulated nor presented the notes, but about a week after the banker had failed, demanded payment from the buyer, who refused, the Court held that the seller was bound, not instantly but within a reasonable time, to present or circulate those notes; and as he did neither, and did not even give notice, and so injury may have arisen by loss of responsibility against others, there was such laches as made these notes the seller's own.(*i*)

So, if the seller take a note and alter it, so as to render it void, he loses any claim for the price against the buyer. In a case of this sort, the Court of King's Bench held that the seller, by "altering the bill in an essential part, made it his own as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given."(*k*)

[*108] Where the price has not been fixed, but there is no *doubt of the final bargain, as where the goods have been delivered, the seller, as already stated, is entitled to demand the true, real, or market value of the commodity. The natural and fair presumption, where a commodity currently purchasable in the market is sold, is, that the market price of the day of the bargain is tacitly agreed to.(*l*)

Where the sale is on credit, the future connection of the seller and buyer is as creditor and debtor, and against the price may be set off a debt due by the seller. But set-off is not payment of the price where the contract is not on credit. In England it was, in one case, held that set-off was pleadable against an action for the price of goods to be paid for in ready money.(*m*) But this was discountenanced by Lord Ellenborough, who said as to that case, "where a party upon a sale of goods had stipulated for ready money payment only, which was held to be satisfied by a payment made with his own bill, I defer to the authority, but am not convinced by it."(*n*) Where the price is made payable at a future time, and the term of payment has arrived, set-off in England, or compensation in Scotland, may be pleaded effectually in extinction of the debt. And the distinction between those cases seems to be good, as in the former the seller relies on immediate payment

[*109] *of the money, perhaps for the purpose of answering a debt due that day; whereas, in the other case, the obligation of the buyer to pay at a future term falls into the ordinary circumstances, where set-off may be expected to be urged in satisfaction of the debt.

2. *To Receive the Goods.*—The buyer is under an obligation to receive, as well as to pay for, the goods, and that at the place and time agreed on or understood. He will otherwise be liable not only to the risk of loss, but to pay damages to the seller, as warehouse rent, carriage, &c. But the seller will not have right to sell the goods to another for indemnification of warehouse rent or other expense, without judicial authority. Thus, in a case where goods sold were not taken away by the buyer, the seller, after notice to that effect, proceeded to sell them to another. Lord Ellenborough said,

(*i*) Camidge v. Allenby, 1827; 6 Barn. and Cress. 373; 1 Bell's Illus. p. 113.
(*k*) Alderson v. Langdale, 1832, 3 Barn. and Ad. 660; 1 Bell's Illus. p. 113.
(*l*) See the cases of Acebal, and Hoadley, and Leslie, quoted supra pages 19 and 20.—In Scotland, the prices of grain are fixed by a judicial act, on evidence called the fiar prices. But that is held to be the criterion only for bargains and transactions between landlord and tenant, or where the bargain is made with express reference to the fiar prices.
(*m*) Eland v. Karr, 1801; 1 East, 375.
(*n*) Fair v. M'Iver, 1812; 16 East, 130.

"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse rent, or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract."(o)

The correct course is that followed in Scotland, to apply for judicial authority to sell the goods, the buyer being cited as a party.

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## *CHAPTER V. [*110]

### EXPRESS CONDITIONS IN SALE.

Besides implied conditions already considered, there are frequently introduced conditions by express convention, which produce important effects on the obligation of the parties.

They are reducible to two classes, 1. Such as suspend the sale; and, 2. Such as dissolve the transfer after it has been completed.

The law relative to such conditions, in France and in Scotland, is explained by Pothier and by Stair;(a) and the effect of these, though unquestionable as between the parties, admits of an important distinction when purchasers or creditors are concerned.

1. *Suspending Conditions.*—The effect of a suspending condition in a sale is, that, while the event is still undetermined, the sale is pendant; and neither in England is the property passed, nor in Scotland is the risk altered.

Those conditions are various; and,

(1.) It is sometimes made a condition, that the commodity shall, on arrival, be approved of by the buyer. In that case there is no transference till the buyer announce *his approval, or shall be held as approving, by lapse [*111] of such reasonable time as may be necessary to examine the thing and make the communication.

(2.) Sometimes the sale is on trial, and approval within a certain time. Here, on the one hand, the buyer has the full appointed time to declare his mind; and, on the other, the expiration of the time, without notice, makes the sale absolute.(b)

(3.) A bargain on sale and return is a conditional sale, only, 1st, if the goods be sold by the consignee; or, 2d, if they be kept beyond the time fixed for their return, or beyond a reasonable time.(c) In this transaction of sale and return, the property is in suspense till sold, or the election determined; and, in the meantime, the creditors of the person so sending the goods will take them. But any of them sold are sold to the benefit of the person having them on sale or return, and his creditors will be entitled to the price, not the sender of the goods.(d)

(4.) A sale on arrival is also conditional, and in the loose use of mercantile language it is held to mean the arrival of the goods, not that of the ship in

(o) Greaves v. Ashlin, 1813; 3 Camp. 426.
(a) Pothier's Tr. des Oblig., Nos. 198 and 224; 1 Stair, 14. 5.
(b) Gibson v. Bray, 1817; Holt, 556, and Note; 8 Taunt. 76. Ellis v. Mortimer, 1812; 1 New Rep. 257. Humphries v. Carvalho; 16 East, 46.
(c) Gibson v. Bray, supra, (o).
(d) Baylie v. Gouldsmith; Peake, Nisi Prius, 56.

which they may be described as intended to come,(*e*) the contract being good as a ground of damages if the goods are detained by the fault of the seller.(*f*)

(5.) It is also a condition precedent and suspensive, where the subject is [*112] put in the possession of another, on *the footing of location, to be kept at a certain hire during an appointed term.(*g*)

2. *Resolving Conditions.*—When the condition is not suspensive, but only a provisional voidance of the sale, the effect as against creditors is the converse of the suspending clause. The sale is complete from the first, but the fulfilment of the condition will not retransfer the property.

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[*113] *CHAPTER VI.

THE RIGHT OF LIEN, AND STOPPAGE IN TRANSITU FOR THE PRICE.

It has already been observed, that, by the law of England and America, delivery of the goods sold is not necessary to the change of the ownership, but that this change is at once accomplished by the mutual agreement of the seller and buyer to exchange a specific commodity for a certain price; while in those countries which followed the principles of Roman jurisprudence, the sale is merely a contract, making the parties debtor and creditor to each other, the one for the price, the other for the commodity, the ownership remaining unchanged till delivery has been made; that France and Holland have recently so far departed from this principle of the Roman law, as to adopt in this respect, the rule of the law of England; but that Scotland has adhered to the principle formerly so widely adopted.

The effect of this difference is so remarkable, and, in regard to the law of Scotland, so much to be regretted, as to impose the necessity of inquiring very anxiously into the nature and description of the several kinds of delivery by which the ownership of goods is transferred. Amidst the different rules, however, which prevail as to the necessity of delivery, in order to change the ownership, the seller has, in all the nations which have been mentioned, [*114] a recognised right to be secured for *payment of the price by retention of the goods, if still in his hands, till it is paid; or even by recovering possession for that purpose, so long as the goods are in transit towards the buyer.

In this chapter shall be considered, 1st, The several recognised acts of delivery; and, 2d, The right of lien, and stoppage in transitu.

### I. *Delivery, Actual and Constructive.*

By the law of England and America, delivery of the goods is requisite to the completion of the sale, where the question is on the statute of frauds, and the contract is parole, without earnest given, or part payment of the price, so

(*e*) Boyd v. Sifkin, 1809; 2 Camp. 326; 1 Bell's Illus. p. 106.
(*f*) Idle v. Thornton, 1812; 3 Camp. 274.
(*g*) See Cowan v. Spence, 21st May 1824; 3 S. 28; 1 Bell's Illus. p. 108. Wight v. Forman, 10th Dec. 1828; 7 S. 175; 1 Bell's Illus. p. 108.

as to bind the bargain. Delivery is not necessary in Scotland to complete and render binding this parole contract; but it is required to pass the property from the seller to the buyer. In both systems of law, however, it is necessary to attend particularly to the description of delivery sufficient to produce those several effects. In England, under the statute of frauds, delivery requires to be completed by acceptance on the part of the buyer, in order to prove the mutual assent of the parties by which alone the sale is constituted. In Scotland, the proof of the contract being otherwise supposed complete, the requisite of delivery is referable to another principle, namely, whether the seller having received the price, or being satisfied with the buyer's engagement to pay it, has by an overt act clearly indicated that he has abandoned all right of ownership to the buyer, and given up the commodity to his disposal, without leaving such ground of reputed ownership in himself as to raise a fale credit.

The question of delivery in the English and American *law, under the statute of frauds, has already been considered.(a) The doctrine [*115] of delivery in Scotland to pass the property will now deserve attention.

As it is not enough to save the goods from the seizure by the creditors of the seller that the price is already paid, it thus becomes a matter very important for the purposes of substantial justice, that the description of delivery, sufficient to change the property, should be as much as possible enlarged, without infringing the principle, that without delivery there can be no transference.

Strictly speaking, the delivery of an article sold implies that it is placed in the actual corporal possession of the buyer. But the impossibility in some cases, the difficulty, or inconvenience in others, is so great, of accomplishing this actual delivery, that, in legal construction, some acts have, in cases where the price is paid or secured, been considered as delivery, though not answering fully to this description. These acts are called acts of *constructive delivery*, as contradistinguished from those of *actual delivery*.

It is necessary to prove actual delivery only where the question relates to the seller's lien for the price, or to his right to stop in transitu, and for this purpose to establish that the seller has given up all hold on the goods as already in the buyer's possession and disposal. In questions of ownership, as against the seller or his creditors, it seems unnecessary to go so far, but sufficient to shew such fair indication of the goods being sold, as may avoid any false credit to the seller; and such are these acts recognised as constructive delivery.

Some acts may thus be admitted as delivery by construction of law, [*116] *although the goods may still remain within the premises of the seller, provided they are marked with any badge of transference. Others may be so recognised when the goods have left the immediate possession of the seller, though they have not yet come within the power of the buyer. And,

1. Where the thing sold is so bulky as not to be easily removed on the purchase being made, it is a sufficient delivery to place it in a grange, or warehouse, or cellar, and give or send the key to the buyer. It is so held in England in questions under the statute of frauds. Thus, Lord Kenyon, in a case where a stack of hay was sold, but not removed from the spot, took

(a) Ante, p. 41.

occasion to lay it down: "Where goods are ponderous and incapable, as here, of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property."(*b*)

In the Roman law, and in the law of Scotland, it is settled that delivery of the key of a warehouse, in which goods are lodged, is sufficient as a constructive delivery.(*c*)

2. Goods sold, and delivered to a carrier or shipmaster, are held to be delivered to the buyer, so as fully to entitle him, in preference to the creditors of the seller, to demand them from the carrier, on payment of the price, or [*117] during the period of allowed credit, where he *is not vergens ad inopiam. This is settled both in England and in Scotland; and not only where the carrier is selected by the seller, but also where he is appointed by the buyer.(*d*)

3. Where goods are delivered to a wharfinger to be by him sent to the buyer, or where they are placed in his hands by a shipmaster or carrier, who has brought them from a distance, it is a delivery to pass the property to the buyer, though still the goods may be liable to stoppage for the price. This also is settled in both countries.

4. Where the delivery of a cargo has begun to be made, it is an effectual delivery by construction of law, even of the part still in the course of delivery, to the effect of changing the property.(*e*)

The cases in which doubts have chiefly been entertained, are those in which the goods still remain in the open possession of the seller, but as to which he has done all that is incumbent on him, or possible, or usual, consistently with the mutual convenience of the parties, to place the goods at the disposal of the buyer; as where goods bought in a shop and paid for are put aside to be sent for by the buyer; or cattle or horses sold are placed in a separate field or stable for the buyer; or wine is placed in a separate binn for the buyer; or goods are measured or weighed and set apart and marked for the buyer.

The difficulty in all those cases is to reconcile the rule to which the prin- [*118] ciples of the Roman law, as followed *in Scotland and in Holland, plainly lead, with the substantial justice of the case, and with the rule settled in England and America, and now, from its equity, adopted in modern France. While there is nothing which can fairly answer to the description of delivery of the goods, the principle of the Roman and Scottish Law undoubtedly is, that the goods remaining with the seller under an obligation to deliver them, the buyer is a creditor only for the delivery, having a personal action to that effect, but no real right; and the consequence of this is, that, on the seller's bankruptcy, his creditors take the goods as still untransferred. In a case where 98 bolls of wheat were sold to a baker, and being,

(*b*) Chaplain v. Rogers, 1 East, 192. See also Simon v. Motivos, 3 Bur. 1921.
(*c*) 2 Instit. i. § 45; Dig. 41, t. 1, l. 9, § 6; 2 Ersk. i. 19. More v. Brodie, 3d July 1801; 1 Bell. Com. 175. Maxwell and Co. in the House of Lords, 5 Wilson and Shaw, 269; 1 Bell's Illus. p. 400.
(*d*) Litt v. Cowley, 7 Taunt. 169; 1 Bell's Illus. p. 192.
(*e*) See Abbot on Shipping (Shee's Ed.,) 468. Slubey v. Heyward, 1793; 2 Hy. Blackst. 504; 1 Bell's Illus. p. 384. Hammond v. Anderson, 1804; 1 Bos. and Pul. New Coll. 69; 1 Bell's Illus. p. 384.

with other wheat of the same quality, lodged in the seller's granary, an order was given to the buyer on the servant who had the charge of that granary, to deliver the wheat when called for, it being the established custom of the baker trade so to purchase wheat, and take it out of the granary as required. In the Court of Session there was a difference of opinion on the Bench, Lord President Blair having stated the principles of the Scottish law as leading, in such a case, to the conclusion that there was no delivery, and so, that the creditors of the seller were preferable to the buyer; but the majority of the Judges held the delivery sufficient.(*f*)

In another case, where cattle were sold by public sale, in the articles of which it was agreed that the cattle sold should be kept fourteen days without hire, the cattle purchased were accordingly put into a field belonging to the seller, to be kept for the buyer, and *on the bankruptcy of the seller, his creditors claimed them as untransferred. The Judges were [*119] equally divided; but it was agreed that judgment should stand for the buyer, in order that the case might be carried to the House of Lords; but it was settled out of Court.(*g*)

It is much to be regretted that this case was not carried to the House of Lords, so that a question of so much importance, and in which the law of England, America, and France, would have held the property as transferred, might have been decided in the last resort.

In the only case that has since occurred, an act of delivery was held sufficient, although the goods still remained in the premises of the seller. A pipe of port wine had been sold and paid for, was bottled off for the buyer, and placed in a binn appropriated to his use, and so marked in the binn-book. The question arose on the bankruptcy of the wine-merchant, and the delivery was held complete, so as to pass the property to the buyer.(*h*) In this case the question may be said not to have occurred in a form so pure as to let the decision be considered as settling the point, for there were some other circumstances besides the mere setting apart of the wine, to indicate a change of property. But, upon the whole, it would certainly be a subject of regret, if, in the abstract question, any other decision were to be pronounced. For, if the point be held as settled according to the decision of this case, the only very objectionable part of the doctrine *relative to the passing of [*120] goods sold, would, in Scotland as well as England, France, and America, be entirely reconcileable with the rules of equity.

## II. *Of the Seller's Lien, and Right to stop in transitu.*

While the thing sold remains in the hand of the seller, he has a right to retain it in security, if the price has not been paid, and the buyer has become insolvent. This is a rule of equity grounded on the great hardship which would be produced if the creditors of the buyer should be entitled to demand delivery of the thing sold, while the seller could demand only a shilling, perhaps, as his part of the price. It is a direct consequence of the law of mutual

(*f*) Broughton v. Aitchinson, 1 Bell's Com. 180; 1 Bell's Illus. p. 378.
(*g*) Lang v. Bruce, 7th July 1832; 10 S. 777; 1 Bell's Illus. p. 386.
(*h*) Gibson v. Forbes, 9th July 1833; 11 S. 916; 1 Bell's Illus. p. 387.

contract, in that jurisprudence which recognises sale as a contract rather than a transmutation of the subject of the bargain.

But the right of the seller to be secured in payment of the price, may, on the same principle, be carried beyond the mere right of retention, and a power given to him to follow after his goods, and order them to be withheld from the buyer, to the effect of continuing his lien upon them, provided they have not actually got into the power and dominion of the buyer.

In ENGLAND, this doctrine has been long established. It was first introduced in courts of equity, and afterwards received in courts of law. The chief difficulty in thus adopting a plain rule of equity, arose from the principle, that, by sale, the property passed to the buyer; and when that was completed, by the seller ceding the possession, it was difficult to find a principle on which to admit of stoppage, unless on the ground of an entire voidance of the sale; and on this point much *controversy arose, while many [*121] difficulties were foreseen, from the necessary consequence of holding the sale to be annulled.(*i*)

In SCOTLAND, while the right of retention was held to be a necessary consequence of the reciprocal engagements of the parties, a rule was adopted from the customs and usage of Holland, that even after delivery of the thing sold, it might be recalled and restored to the seller, if the delivery had been procured by fraud; and bankruptcy of the buyer following shortly after delivery, was held, presumptione juris, to be fraudulent.(*k*)

This doctrine was perfectly consistent with legal principle, but in practice it did not answer all the uses of the English doctrine of stopping in transitu; and a case decided in Scotland on the above principle, having been carried by appeal to the House of Lords, the English law of stoppage was introduced.(*l*)

When thus introduced, the doctrine was found to be quite consistent with the principle of the Scottish law; *for, while yet the thing had not [*122] come into possession of the buyer, the act of delivery was incomplete, and might, fairly on principle of lien be stopped, and the middle men acting as the hand of the seller, be directed to withhold delivery.

Different, however, as the course has been in the establishment of the doctrine of stoppage in England and in Scotland, and different, also, in the principle on which it rests, the great lines of the doctrine are the same in both countries.

In AMERICA, the law of stoppage, as well as of lien for the price, has been adopted in all its extent; and all the authorities and precedents in England are daily relied on in the courts of the United States.(*m*)

In HOLLAND, the same principles which in Scotland had led to the remedy of restitution, on the ground of presumed fraud, as an equitable extension of

(*i*) See the cases of Wiseman v. Vandeputt, 2 Vern. 203; 1 Bell's Illus. p. 403. Snee v. Prescot, 1 Atk. 246; 1 Bell's Illus. p. 401. D'Acquila v. Lambert, Ambler, 399; 1 Bell's Illus. p. 403. Bloxam v. Sanders, 4 Barn. & Cress. 941; 1 Bell's Illus. p. 92. Clay v. Harrison, 10 Barn. & Cress. 99; 1 Bell's Illus. p. 287. 412. Steven Stephens v. Wilkinson, 2 Barn. & Ad. 323. Edward v. Brewer, 2 Meeson & Welsby, 375. See 6 Rob. Ad. Rep. 321.

(*k*) Inglis v. Royal Bank, June 16, 1736; Mor. 4936. See 1 Bell Com. 245; 1 Bell's Illus. p. 13.

(*l*) See Allan, Stewart, & Co., v. Stein's Creditors, Dec. 23, 1790; Mo. 4949. 4951; 1 Bell Com. 244, note 3, 246, note 2; 1 Bell's Illus. p. 15, 402.

(*m*) 2 Kent's Com. 541.

the law of mutual contract, had, under the old law, settled the same doctrine in law and mercantile usage.(*n*) The matter is now regulated by the new Code de Commerce Hollandois, on the following footing,(*o*)—1st, That on the bankruptcy of the buyer, the price being unpaid, goods sold and delivered may be taken back by the seller within thirty days, provided they have not passed into the hands of a third party, in bona fide, by sale or pledge, or been confounded with the other goods of the buyer, the seller paying the price of carriage, insurance, &c. 2d, The same rule holds proportionally, when a *part only of the price has been paid. 3d, The seller may stop the goods while still on the way to the buyer. 4th, These remedies are [*123] not competent if the goods have been sold while on their way to the buyer, by transference of bill of lading, in bona fide; but if the purchaser from the original buyer have not yet paid the price, the original seller is entitled to claim it.

In FRANCE, the principles of the Roman law were at first followed, and restitution or resolution of the sale admitted, even after the actual delivery of the goods, if still capable of identification, where the price was not paid; but the legislators who prepared the Code de Commerce, proposed that this law should be altered, and the doctrine of stopping in transitu established. This change, with the reasons on which it proceeded, are explained in the "Discours des Orateurs du Gouvernement."(*p*) And in the Code de Commerce, the rules of revendication are laid down nearly upon the same grounds with those already alluded to as forming the foundation of the English doctrine.(*q*)

There thus appears to be great uniformity of doctrine on this subject, in the several countries to whose jurisprudence it is of the most importance to look. That doctrine seems to be reducible to the following propositions:—

1. That the delivery is not complete, nor the possession of the seller terminated, till the goods have come within the power and disposal of the buyer.

2. That till this has taken place, the seller has a right to direct the goods to be withheld by the carrier, wharfinger, or other middleman in whose hands they *may be, for the purpose of being forwarded to the [*124] buyer.

3. That the seller's right so exercised is grounded in equity, not on the footing of the contract being dissolved, but as a just security for the price; the goods so stopped being in the hands of the middleman no otherwise than they would have been in the seller's own hands, if they had not left his premises, that is, under lien for the price.

4. That the consequence of this is, to give to the buyer or his creditors a right to insist for delivery of the goods on tendering the price, and to the seller a right to demand the price as a debt secured by real lien on the goods. And,

5. That the right of the seller cannot be exercised to the prejudice of any third party who, in bona fide, has received from the buyer a transference by bill of lading, or other negotiable instrument.

(*n*) Voet ad Pand. lib. 6, t. 1 § 14. Van Lleeuwen Censura Forensis, lib. 4, c. 19, § 20. Bynkershoeck, Ques. Jur. Priv. lib. 3, c. 15.
(*o*) Code de Com. de Hollande, Art. 230, et seq.
(*p*) See the passage quoted, 1 Bell Com. 207.
(*q*) See Code de Commerce, Art. 576-585.

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